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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 8, 1990

QUESTIONS PRESENTED

Congress's core/non-core distinction in 28 U.S.C. § 157 and the lack of clarity as to the bankruptcy court's authority to conduct jury trials have led to confusion among the courts over the proper scope of the bankruptcy court's jurisdiction. This case presents two questions integrally related to significant Constitutional rights threatened by the Second Circuit's decision below.

I. Whether the post-petition status of the contract underlying this case requires a core designation pursuant to 28 U.S.C. § 157 when the contract dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims.

II. Whether a jury trial of this case in the bankruptcy court comports with article III and the seventh amendment of the Constitution when an article I judge presides over the trial subject only to appellate review in the district court.

LIST OF PARTIES AND RULE 29.1 LIST[1]

Petitioner The Insurance Company of the State of Pennsylvania is a subsidiary of American International Group, Inc., an insurance holding company which is parent to numerous domestic property/casualty insurance companies. Said Petitioner has no subsidiaries.

Petitioner Kerwick & Curran, Inc. has no parents, subsidiaries, or affiliates.

[1] Kalvin-Miller International, Inc. is a party to the proceedings below and has not joined in this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners, The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc., respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 7, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 896 F.2d 1394 (2d Cir. 1990). It appears in the Appendix at A-1.[2]

The oral opinion and order of the United States District Court for the Southern District of New York has not been reported. It is reprinted in the Appendix at A-23.

The oral decision and order of the Bankruptcy Court for the Southern District of New York determining that this adversary proceeding is core has not been reported. The pages of the transcript of the hearing in which the ruling appears are reprinted in the Appendix at A-29.

The oral ruling of the District Court for the Southern District of New York on May 31, 1989 directing the Bankruptcy Court to determine whether this adversary proceeding is core has not been reported and is not included in the Appendix.

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[2] References to "A- " followed by a page number indicate reference to the Appendix attached hereto.

JURISDICTION

Respondent, Ben Cooper, Inc., commenced this adversary proceeding in the United States Bankruptcy Court for the Southern District of New York seeking a stay of certain state court proceedings that had been instituted against it by Petitioner The Insurance Company of the State of Pennsylvania. Ben Cooper, Inc. further sought to have the parties' respective rights under contract adjudicated and resolved in the bankruptcy court as a "core" matter. The Honorable Cornelius Blackshear, U.S.B.J., stayed the state court proceedings, held that the adversary proceeding was a core matter within the meaning of 28 U.S.C. §157(b)(2), and retained jurisdiction.

Petitioners appealed the order of the bankruptcy court to the district court. The Honorable Louis L. Stanton, U.S.D.J., held that the adversary proceeding was a related non-core matter and withdrew the reference to the bankruptcy court in view of Petitioner's entitlement to a jury trial which had been timely demanded.

Respondent appealed to the Court of Appeals for the Second Circuit. On February 7, 1990 the Second Circuit entered an order reversing the district court's order and remanding the matter to the bankruptcy court, holding that the adversary proceeding was core and that Petitioners were entitled to a jury trial in the bankruptcy court.

The jurisdiction of this Court to review the order of the Second Circuit is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this petition for certiorari are article I, article III, and the seventh amendment.

The statutes involved in this petition for certiorari are 28 U.S.C. § 157, 28 U.S.C. § 158, and 28 U.S.C. § 1411, and are reprinted in the Appendix at A-31, A-33, and A-34, respectively.

STATEMENT OF THE CASE

Ben Cooper, Inc. ("Cooper"), a costume import/manufacturing business, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in April, 1988. Thereafter, Cooper employed the services of two brokers, co-petitioner Kerwick & Curran, Inc. ("KC") and Kalvin-Miller International, Inc. ("K-M"), to procure various insurance policies. As a result of the brokers' efforts, The Insurance Company of the State of Pennsylvania ("ICSP") issued property and general liability insurance coverage (the "Policy") to Cooper, as debtor-in-possession, in October, 1988. On January 6, 1989 there was a small fire at Cooper's Georgia warehouse (the "Loss"). The claim submitted by Cooper to ICSP concerning the Loss led to the dispute underlying this matter.

In April, 1989 ICSP commenced an action in the state court seeking, *inter alia*, to void the Policy on the ground that its issuance had been induced by material misrepresentation. ICSP's pleading also sought a declaration that there was no liability under the Policy in any event because of Cooper's misrepresentations and fraudulent exaggerations relating to the Loss. Simultaneously with the institution of ICSP's state court action, ICSP sent Cooper a notice of cancellation of the Policy based on the same misrepresentations.

On May 9, 1989 Cooper commenced an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York (the "Adversary Proceeding") seeking various forms of relief against ICSP, KC, and K-M. In its complaint, Cooper alleged that ICSP was liable under the Policy for the Loss. Alternatively, Cooper alleged that if the court found the Policy to be void *ab initio*, its brokers, KC and K-M, would be liable to it for failing to place the insurance properly. Cooper also moved in the bankruptcy court for a stay of ICSP's state court action, contending that the controversy was a core matter which should be adjudicated in the bankruptcy court. Additionally, Cooper sought to stay ICSP's attempted cancellation of the Policy.

In its answer to Cooper's complaint, ICSP raised affirmative defenses based on material misrepresentation in the Policy's procurement and fraudulent exaggeration of the claim for the Loss, the same matters which ICSP had alleged in its state court action. ICSP demanded a jury trial, as did KC and K-M in their answers.

The Honorable Cornelius Blackshear, U.S.B.J., granted Cooper the initial relief it had sought by motion. In a hearing held on May 17, 1989, Judge Blackshear ruled from the bench: he stayed the state court action; enjoined cancellation of the Policy; and ordered expedited discovery.

Following the bankruptcy court's ruling, ICSP, joined by KC and K-M, moved in the district court for withdrawal of the reference of the Adversary Proceeding to the bankruptcy court. In a hearing on May 31, 1989, the Honorable John M. Walker, U.S.D.J., declined to hear ICSP's request for relief until the bankruptcy court made a specific determination of whether or not the matter was core. At Judge Walker's direction, oral argument was heard on June 15, 1989 before Judge Blackshear who ruled from the bench that the Adversary Proceeding was core pursuant to 28 U.S.C. §§ 157(b)(2)(A) (estate administration) and (L) (confirmation of plans). (A-29.) At that time Judge Blackshear expressed skepticism as to whether ICSP and its co-defendants were entitled to a jury trial. He concluded, however, that since he had found the Adversary Proceeding to be core, the matter would remain within the bankruptcy court for plenary adjudication and fact-finding.

Following Judge Blackshear's ruling that the matter was core, ICSP, KC, and K-M moved in the United States District Court for the Southern District of New York for relief from the bankruptcy court's order. In an oral ruling on July 11, 1989 the Honorable Louis L. Stanton, U.S.D.J., reversed Judge Blackshear's ruling, withdrew the reference to the bankruptcy court, abstained from exercising jurisdiction in the district court, and lifted the stay of the state court proceeding. (A-29.) Judge Stanton also lifted the stay which had enjoined ICSP from canceling the Policy. In so doing, the court found that the

controversy, which concerned only state law issues as to an insurance company's liability for a loss sustained by the debtor-in-possession, was not rendered core merely because its resolution might bring funds into or otherwise affect administration of the estate. The court's withdrawal of the reference was based in part on the further finding that ICSP and its co-defendants were entitled to a jury trial. Judge Stanton concluded that the requirement of *de novo* review in the district court would be incompatible with the conduct of a jury trial in the bankruptcy court.

Cooper appealed the district court's ruling to the United States Court of Appeals for the Second Circuit. The Court of Appeals reversed the district court and remanded the proceeding to the bankruptcy court. (A-1.) The court held that the proceeding was core because the underlying contract, the Policy, had been entered into after Cooper filed its bankruptcy petition. The Second Circuit found that resolution of the dispute would necessarily affect administration of the bankruptcy estate. The court further held that the defendants were entitled to a jury trial, and that the jury trial could take place in the bankruptcy court.

REASONS FOR GRANTING THE WRIT

POINT I

THE SECOND CIRCUIT'S FINDING THAT A POST-PETITION CONTRACT IS NECESSARILY CORE IGNORES THIS COURT'S PRONOUNCEMENT IN *MARATHON* AND UNDERSCORES THE SUBSTANTIAL UNCERTAINTY THAT HAS RESULTED FROM CONGRESS'S FAILURE TO DEFINE "NON-CORE" UNDER THE BANKRUPTCY AMENDMENTS TO THE FEDERAL JUDGESHIP ACT

The Court of Appeals for the Second Circuit below agreed with the conclusion of the United States Bankruptcy Court for the Southern District of New York in finding that an ordinary state law contract dispute between an insurance company and its insured in reorganization under Chapter 11 of the United States Bankruptcy Code is a core matter pursuant to 28 U.S.C. § 157(b)(2). The Second Circuit concluded that a contract

dispute involving insurance of estate assets is core as contemplated by Congress in section 157(b)(2). The finding turns solely on the fact that the insurance contract in question was entered into after the debtor had filed its Chapter 11 petition. In so holding, the court below adopted the views of the First Circuit and expressly rejected those of the Fifth and Ninth Circuits.

The Second Circuit discarded the lower court's reasoning by distinguishing *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) on the ground that the controversy in *Marathon* had arisen from a pre-petition contract and claim. The court below did not present any rationale based on *Marathon* that would justify the application of the purported distinction, that is, whether the underlying contract is entered into pre-petition or post-petition.

There can be little dispute as to the critical significance of the distinction between core and non-core proceedings. Pursuant to Congress's Bankruptcy Amendments to the Federal Judgeship Act in 1984 (the "BAFJA"), the statutory scheme that attempts to delineate the scope of the bankruptcy court's power to hear and resolve disputes, bankruptcy judges have plenary powers of adjudication over core proceedings. 28 U.S.C. §§ 157(b), 158(a). With respect to non-core matters, however, a bankruptcy judge's findings of fact and conclusions of law are subject to *de novo* review by the district court. 28 U.S.C. § 157(c)(1). The determination of whether a matter is core or non-core dictates in what forum, an article III court or an article I court, a particular dispute will be heard and resolved. Not only does that determination have a substantial effect on a multitude of transactions in the public and private arenas, it also raises issues of constitutional proportions with respect to the proper authority of the diverse courts in which controversies are adjudicated.

Decisional law in circuits other than the Second Circuit recognizes that the analysis of whether a proceeding is core ought not to turn arbitrarily on the distinction between a pre-petition and post-petition matter. *See* discussion, *infra* of Fifth and Ninth Circuits' decisions. Indeed, the Court in *Marathon* established

the dichotomy between the two essentially distinct types of claims related to and arising exclusively under bankruptcy proceedings, to wit, private rights versus rights core to the federal bankruptcy power, respectively. Certainly the spirit of the *Marathon* decision was not that a pre-petition/post-petition bright line would suffice as the demarcation between core and non-core matters.

In the wake of the Court's decisions in *Marathon* and *Granfinanciera, S.A. v. Nordberg*, ____ U.S. ____, 109 S.Ct. 2782 (1989), and Congress's enactment of the BAFJA, there is much confusion in the lower courts over the proper scope of the bankruptcy court's jurisdiction. Specifically, the lower courts have rendered conflicting decisions concerning what matters are non-core in light of 28 U.S.C. § 157(b)(2) and its non-exhaustive list of enumerated core matters. The courts have been unable to delineate one test to determine whether a matter is core or non-core. Although section 157 provides a list of specific matters which are core, the courts have not been able to distinguish with consistency between unenumerated core matters and those matters which are non-core.

The Court described the distinction between core and non-core matters in *Marathon* as follows:

> [T]he restructuring of debtor-creditor relationships, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.

Marathon, 458 U.S. at 72. Clearly, the distinction between core and non-core is derived from the specific underlying rights involved.

In response to the Court's pronouncement proscribing the authority of an article I bankruptcy judge to rule upon what are essentially state law claims, Congress amended the Federal Judgeship Act to draw a distinction between core and non-core

matters. 28 U.S.C. § 157(b)(2). The very purpose of the BAFJA was to set the appropriate limits of the bankruptcy court's authority to hear and resolve disputes in light of *Marathon*. Congress described core matters as those matters which directly relate to the restructuring of the debtor-creditor relationship. What Congress failed to do was give any clear indication of what would constitute "non-core" matters. A careful reading of *Marathon*, however, mandates that a distinction be made between the "adjudication of state-created private rights" and matters at the "core of the federal bankruptcy power." The proper conclusion to be drawn is that adjudication of ordinary state-law contract claims involves private rights between individuals and is not, as a matter of course, core to bankruptcy proceedings.

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court considered Congress's ability to vest decision-making authority in the Environmental Protection Agency, an administrative agency created pursuant to article I. The Court relied upon its decision in *Marathon* and pointed to the public rights/private rights dichotomy, emphasizing the distinction between claims arising from statutorily created rights and those claims between individuals arising under state law. The Court's decision in *Thomas* reiterates the proposition that disputes between individuals that arise wholly independently of any Congressionally created statutes must be subject to an article III court's adjudication; plenary power to review such matters cannot be delegated to an article I court.

The Second Circuit appears to have adopted a bright line test to determine whether a matter is core or non-core, to wit, the court below used the date of the debtor's bankruptcy petition filing. According to the Second Circuit, contracts entered into post-petition filing are core. It is not clear whether the court intended the converse to hold true as well, namely that contracts entered into prior to a debtor's Chapter 11 filing are non-core.

The decision below, therefore, ignores the Court's statement in *Marathon*, as well as section 157(b)(2), concerning the

important distinction to be made between core and non-core proceedings. The Second Circuit did not consider the nature of the underlying dispute – ordinary state law contract claims – and concluded that any individual who enters into a contract with a debtor-in-possession automatically submits to the jurisdiction of the bankruptcy court for adjudication of all disputes. Yet, the Second Circuit would have the very same parties who entered into an identical contract *prior* to the debtor's bankruptcy filing resolve their disputes arising from that contract in the article III courts as ordinary state law contract claims.

The impetus for the Second Circuit's pre-petition/post-petition distinction was a First Circuit case, *Arnold Print Works, Inc. v. Apkin (In Re Arnold Print Works, Inc.)*, 815 F.2d 165 (lst Cir. 1987). In that matter, the First Circuit recognized that post-petition claims are traditionally core matters. The dispute was over the liquidation of bankruptcy estate assets, an enumerated core matter under section 157(b)(2)(O). The Second Circuit's ruling in this case, however, did not focus on the significance of that element in *Arnold Print Works*. Clearly the case at bar does not involve any enumerated core matter under section 157(b)(2). It is the First Circuit's *dicta* in *Arnold Print Works* that form the basis of the Second Circuit ruling that Cooper's insurance dispute is core. The logical extension of the ruling is an all-inclusive core category – encompassing virtually all post-petition contracts – which effectively nullifies Congress's attempt to resolve the problems highlighted by *Marathon*.

The Ninth Circuit has adopted a divergent view of the proper scope of the bankruptcy court's authority. In *Piombo Corp. v. Castlerock Properties, Inc. (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986), the court interpreted section 157 narrowly. Citing *Marathon* and *Thomas* the Ninth Circuit held that:

> state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(B)(2)(B)-(N) are related proceedings under § 157(c) even if they arguably fit within the

> literal wording of the two catch-all provisions, Sections § [sic] 157(b)(2)(A) and (O).

Castlerock Properties, 781 F.2d at 162.

The Court of Appeals for the Fifth Circuit is in accord with the Ninth Circuit's approach in *Castlerock Properties* as well as the views expressed by the bankruptcy court in *Acolyte Electric Corp. v. City of New York*, 69 Bankr. 155 (Bankr. E.D.N.Y. 1986) *aff'd*, 1987 WL 47763 (E.D.N.Y. 1987) (Hon. Jack B. Weinstein), see discussion, *infra*. In *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), the Fifth Circuit defined the test for determining what are core matters as follows:

> We hold, therefore, that a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. . . . [The controversy here] is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court.

Id., 825 F.2d at 97.

In *Wood*, the Court of Appeals concluded that an action brought against a debtor and a third party for wrongful appropriation of corporate assets that occurred prior to the Chapter 11 bankruptcy filing was not core. In its analysis of the Court's intentions in *Marathon* and the meaning of section 157(b)(2) as applied to the cause of action at issue in *Wood*, the Fifth Circuit examined the question as follows:

> If the proceeding does not invoke a substantive right created by the Federal Bankruptcy Law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under Section 157(c)(1) it is an "otherwise related" or non-core proceeding.

Id. (emphasis in original).

The Fifth Circuit follows a test that is true to the Court's holding in *Marathon*. It is the nature of the dispute and not its effect on the reorganization that should be determinative. *Wood*, 825 F.2d at 95. This test has also been applied by the Bankruptcy Court for the Eastern District of New York in *Acolyte Electric*, 69 Bankr. 155. The Second Circuit, however, did not accept the reasoning of the Honorable Marvin Holland, U.S.B.J., in his comprehensive opinion in *Acolyte*. Judge Holland determined that the adversary proceeding in that case was not a core proceeding because "resolution of th[e] action involve[d] a state law determination of the defendant's liability under the contract . . ." *Id.* at 172. Since the claim had an existence "independent of the bankruptcy environment" it could not be placed among the "core" proceeding categories enumerated under 28 U.S.C. § 157(b)(2). *Id.* at 173.

The Third Circuit also considered the question of what is core and what is non-core under section 157(b)(2). In *Southeastern Sprinkler Co., Inc. v. Meyertech Corp. (In re Meyertech Corp.)*, 831 F.2d 410 (3d Cir. 1987), a creditor of the bankruptcy estate filed a proof of claim for money owed on a pre-petition contract. In its analysis the court noted:

> It is difficult to perceive of a proceeding which would not fall under the all-encompassing language of either § 157(b)(2)(A) or 157(b)(2)(O), [footnote omitted], but we are cautioned that an expansive interpretation of these provisions may lead to some seemingly incorrect and overbroad results regarding core proceedings.

Meyertech, 831 F.2d at 416 (citation omitted). The court also observed that no clear consensus existed among the bankruptcy decisions from the Pennsylvania bankruptcy courts that had wrestled with core/non-core distinction. *Id.* at 417. Ultimately, the Third Circuit decided that the voluntary act of filing a proof of claim itself subjected the creditor to the full jurisdiction of the bankruptcy court: it was a core matter.

In *Marathon*, Justice White's dissent noted that "the great bulk of creditor claims are claims that have accrued under state

law prior to bankruptcy." *Marathon*, 458 U.S. at 96-97. If that be true, the Second Circuit's conclusion that disputes arising from post-petition contracts are necessarily core virtually eliminates the non-core category. Chapter 11 exists to protect the debtor from its creditors and to rehabilitate by, among other things, encouraging others to do business with the debtor undergoing reorganization. It is therefore consistent with the statutory scheme of section 157 that certain pre-petition matters be subject to adjudication in the bankruptcy court as core proceedings. Similarly, the purpose of the statute is furthered if various post-petition controversies be adjudicated in article III courts as non-core matters. Third parties will transact business with debtors in rehabilitation more freely if they do not face the prospect that ensuing disputes will be heard and resolved in the article I bankruptcy courts. Trial before an article III judge is a valuable right which should not be compromised.

It is evident from the above-cited decisions that there is anything but agreement among the circuits as to the proper interpretation of the BAFJA on the question of whether a dispute is core or non-core under 28 U.S.C. §§ 157(b) and 158(a). The divergent rulings are a direct result of the statutory ambiguity in the provisions which are intended to delineate the scope of the bankruptcy court's power to hear and resolve disputes. Confusion among the circuits runs counter to the purpose of uniform federal bankruptcy laws.

POINT II

THE SECOND CIRCUIT'S REMAND OF THIS CASE FOR A JURY TRIAL IN THE BANKRUPTCY COURT VIOLATES ARTICLE III AND THE SEVENTH AMENDMENT OF THE CONSTITUTION

In *Granfinanciera, S.A. v. Nordberg*, ____ U.S.____, 109 S.Ct. 2782 (1989), the Court found that fraudulent transfer claims were triable to a jury. Accordingly, the Court held that the bench trial which had been conducted in the bankruptcy court deprived the petitioner of its seventh amendment right to a jury trial. The Court declined, however, to resolve a closely related

question that had been highlighted by the findings in *Marathon* and the consequent BAFJA.

> We do not decide today whether the current jury trial provision – 28 U.S.C. § 1411 (1982 ed., Supp. IV) – permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions.

Granfinanciera, ____ U.S. at ____, 109 S.Ct. at 2802. While the facts presented in *Granfinanciera* did not necessitate resolution of all the significant constitutional issues, that is not the case here. The Second Circuit's decision in this case invites a pronouncement from the Court as to whether a bankruptcy court is empowered to conduct a jury trial.

Notwithstanding that *Granfinanciera* involved an alleged fraudulent conveyance, an enumerated core matter, the right to a jury trial was preserved:

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, ____ U.S. at ____, 109 S.Ct. at 2800.

The Second Circuit placed significant reliance on *Granfinanciera* in reaching its conclusion that the Petitioners are entitled to a jury trial in the case at bar. The court then turned to the issue of whether that jury trial could be conducted in the bankruptcy court without running afoul of the BAFJA or the Constitution. The lack of guidance in the language of 28 U.S.C. § 1411 was expressly noted, as was the absence of any procedural provision in the Bankruptcy Rules. Nonetheless, the court concluded that because the matter was core, constitutional

proscriptions with respect to *de novo* review did not bar the conduct of a jury trial in the bankruptcy court. Although the court below acknowledged that jury trials in core matters in the bankruptcy court might well be at odds with the seventh amendment, it reasoned that the district court's power to review final orders of the bankruptcy court in core proceedings was analogous to the circuit court's power to review district court orders. Thus, according to the Second Circuit constitutional considerations were satisfied.

Following *Granfinanciera*, the courts have struggled to reconcile the prescribed jurisdiction and authority of the bankruptcy courts with the seventh amendment right to trial by jury. In *Perino v. Cohen (In re Cohen)*, 107 Bankr. 453 (S.D.N.Y. 1989), the court ruled that the plaintiff was entitled to a jury trial based on its finding that the claim was clearly legal rather than equitable. Without expressing any detailed rationale, the Honorable Charles L. Brieant, U.S.D.J., held that, for judicial efficiency, the bankruptcy court "should" conduct the jury trial. *Id.* at 455. Judge Brieant attempted to resolve the conflict between a party's right to a jury trial before an article III judge and the conduct of a trial in the bankruptcy court in the following cryptic pronouncement:

> The Seventh Amendment provisions, and cases decided thereunder, limiting the power of any federal court to modify or disregard a jury verdict, because the Constitution is paramount, will take precedence over any statutory provisions for *de novo* review of factual findings of the Bankruptcy Court.

Id. at 455. Precisely what is meant by the foregoing and how it would be implemented, not to mention whether it would satisfy both the statutory scheme and the seventh amendment, is far from clear.

Hughes-Bechtol, Inc. v. Air Enterprises, Inc. (In re Hughes-Bechtol, Inc.), 107 Bankr. 552 (Bankr. S.D. Ohio 1989), reflects the uncertainty that is pervasive. It concerned state court claims and counterclaims arising out of the supply of labor and materials to the debtor-in-possession. The action was removed

to the bankruptcy court on the ground that it was a core proceeding. The court concluded that the issues surrounding whether a bankruptcy court could conduct a jury trial were academic in view of the fact that the claimants had filed a proof of claim. Nonetheless, the Ohio bankruptcy court (noting that it would customarily refrain from addressing moot issues) felt compelled to analyze the question of whether the bankruptcy court could hold a jury trial. In its lengthy analysis, the court recognized that the resolution of the question was rendered difficult by the "notoriously ambiguous" statutory provision, 28 U.S.C. § 1411. The court also observed that whether a bankruptcy judge may preside at a jury trial is an issue that may require legislation and, ultimately, resolution by the Supreme Court. The court in *Hughes-Bechtol* then opined, in what was clearly *dicta*, that a jury trial in the bankruptcy court was not sanctioned under the Constitution. *Id.* at 571.

In *Haden v. Edwards (In re Edwards)*, 104 Bankr. 890 (Bankr. E.D. Tenn. 1989), the court expressed its uncertainty concerning those issues left unresolved in *Granfinanciera*, namely, whether a jury trial may be conducted in a bankruptcy court. That court's conclusion was that a bankruptcy court could not conduct a jury trial. In reaching its decision, the court expressed the view that after *Granfinanciera* the core versus non-core dichotomy was no longer a relevant distinction.

> The controlling issue, for jury trial purposes, now appears to be whether the proceeding is one which sounded in law or in equity at common law.

Edwards, 104 Bankr. at 893. Citing the pronouncement in *Carr v. Michigan Real Estate Ins. Trust (In re Michigan Real Estate Ins. Trust)*, 87 Bankr. 447, 460 (Bankr. E.D. Mich. 1988), "that when a party properly requests a jury trial in a non-core proceeding, an insoluble jurisdictional mess occurs in the bankruptcy court," the *Edwards* court commented that the statement in *Carr* "can now be broadened to include a core proceeding." *Edwards* at 898, fn. 10.

In *Friedman v. Gold Advice, Inc. (In re Fort Lauderdale Hotel)*, 103 Bankr. 335 (Bankr. S.D. Fla. 1989), another court

was faced with the issue. Citing *Granfinanciera* for its view that the defendant had a right to a jury trial, the court noted that Bankruptcy Rule 9015 which establishes bankruptcy court procedures for jury trials had been repealed. The court went on to cite a Florida district court opinion, *In re I.A. Dubin, Inc.*, 62 Bankr. 139 (S.D. Fla. 1986), as authority for the conclusion that the bankruptcy court did not have power to conduct jury trials.

Germain v. The Connecticut National Bank (In Re O'Sullivan's Fuel Oil Co., Inc.), ____ Bankr. ____, 1990 WL 33093 (D. Conn. 1990) appears to be the first matter on which the Second Circuit's opinion below has had a direct impact. In *O'Sullivan's Fuel*, the court reviewed the bankruptcy court's denial of a motion by the Connecticut National Bank to strike the trustee's jury request. In the lower court, the Honorable Robert L. Krechevsky, U.S.B.J., had concluded that since the claim in question was legal in nature, there was a right to a jury trial. In view of the parties' agreement that a jury trial could not be conducted in the bankruptcy court, Judge Krechevsky had directed the parties to take steps to remove the case from the bankruptcy court.

The district court examined the claims at issue, as had the bankruptcy court, and agreed with Judge Krechevsky's conclusion that the trustee's claims were legal in nature. It further concluded, citing *Granfinanciera*, that the claims involved private rights, hence, would not lose their legal nature merely because they arose in the context of the bankruptcy proceeding. Finding that the right to a jury trial remained, the district court then noted the parties' previous agreement that the bankruptcy court did not have the power to conduct a jury trial. Rather than rule directly on the issue, the district court remanded the matter to the bankruptcy court for it to consider, in light of the Second Circuit's decision in the case at bar, whether it could conduct the jury trial.

O'Sullivan's Fuel is one of several matters which typify the quandary in which the courts find themselves when faced with

a valid jury demand in the bankruptcy court.[3] The reported opinions on the issue have been generated in the context of both core and non-core proceedings. Notwithstanding the painstaking analysis that is evident from much of the decisional law that has developed, there is clearly no consensus on the limits of the bankruptcy court's jurisdiction and power with respect to the conduct of jury trials. Indeed, considerable doubt has been expressed as to the ability of a bankruptcy court to conduct a jury trial without violating article III. These issues are directly presented in the case at bar. Their resolution by the Court would answer critical questions which remain after *Granfinanciera*.

POINT III

THE COURT'S EXERCISE OF JURISDICTION IN THIS CASE IS JUSTIFIED BY THE CRITICAL IMPLICATIONS UNDER ARTICLE III AND THE SEVENTH AMENDMENT OF THE CONSTITUTION

In *Marathon*, the Court held that Congress's broad grant of jurisdiction to bankruptcy judges under 28 U.S.C. § 1471 was in violation of article III of the Constitution. Under article I, section 8 of the Constitution, bankruptcy courts could be empowered by Congress to issue final orders in core proceedings. The legislation which was developed in response to *Marathon* attempted, specifically in section 157, to delineate with greater particularity what matters were at the core of the bankruptcy court's jurisdiction.

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[3] *Jackson v. Wessel (In re Jackson)*, 90 Bankr. 126, 135 (Bankr. E.D. Pa. 1988) ("We do have some reservations as to our conclusion that, even in this matter, involving a core proceeding which presents an action at law, we, as a bankruptcy court, may conduct a jury trial.") *See also, Leird Church Furniture Mfg. Co. v. Union National Bank of Little Rock (In re Leird Church)*, 61 Bankr. 444, 446 (Bankr. E.D. Ark. 1986); *Newman Brewing Co., Inc. v. Schmidt and Sons, Inc. (In re Newman Brewing Co., Inc.)*, 87 Bankr. 236, 239 n.2 (Bankr. N.D. N.Y. 1988); *Baitinger Electric Co., Inc. v. Daidone Electric of New York, Inc. (In re Baitinger Electric Co.)*, 94 Bankr. 33 (S.D.N.Y. 1988).

While the concept underlying the distinction between core and non-core matters is evident, section 157 does not provide any guidance with respect to what matters fall into the non-core category (see discussion, Point I). Moreover, what remained unresolved after *Marathon*, and was not addressed in subsequent legislation, was the way in which one would exercise the right to a jury trial in a bankruptcy court proceeding.[4]

In *Granfinanciera*, the Court focused on several related issues but did not reach the question of whether jury trials in the bankruptcy court – in core or non-core matters – would infringe on the seventh amendment right or the guarantees under article III. Any law or ruling which threatens to erode the seventh amendment right to a jury trial is subject to a high level of scrutiny. *Dimick v. Schiedt*, 293 U.S. 474 (1935). Thus, it is essential that the Court rule upon the constitutionality of the Second Circuit's order that this case be tried by jury in an article I court.

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[4] *Jackson*, *supra*, at 135 ("It is hoped that the Supreme Court, having granted certiorari in the Chase & Sanborn case, will provide guidance to us in this area, at least in the next term.")

CONCLUSION

The Court's pronouncements in *Marathon*, Congress's response, and the Court's holding in *Granfinanciera* have raised issues integral to the proper functioning of the bankruptcy system. The case at bar presents the Court with the opportunity to resolve these significant issues.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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May 8, 1990

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 486—August Term 1989

(Argued December 21, 1989

Decided February 7, 1990)

Docket No. 89-5026

IN RE: BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP,

Debtors,

BEN COOPER, INC.,

Appellant,

—v.—

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Appellees.

Before:

TIMBERS, CARDAMONE and PRATT,

Circuit Judges.

Appeal from an order entered July 11, 1989, in the Southern District of New York, Louis L. Stanton, *District Judge*, withdrawing the reference to the bankruptcy court, abstaining from exercising jurisdiction and lifting a stay of proceedings in the New York Supreme Court, New York County.

Reversed and remanded.

CHARLES S. BIENER, New York, N.Y., (Lowenthal, Landau, Fischer & Ziegler, P.C., New York, N.Y., on the brief) *for appellant Ben Cooper, Inc.*

CONSTANTINO P. SURIANO, New York, N.Y., (Stuart Cotton, Karen M. Cooke, and Mound, Cotton & Wollan, New York, N.Y., on the brief) *for appellee Insurance Company of the State of Pennsylvania.*

VICTORIA A. STEWART, New York, N.Y., (Jackson & Nash, New York, N.Y., on the brief) *for appellee Kalvin-Miller International, Inc.*

GEOFFREY W. HEINEMAN, New York, N.Y., (Ohrenstein & Brown, New York, N.Y., on the brief) *for appellee Kerwick & Curran, Inc.*

TIMBERS, *Circuit Judge*:

Appellant Ben Cooper, Inc. ("Cooper") appeals from an oral decision from the bench on July 11, 1989, in the Southern District of New York, Louis L. Stanton, *District Judge*. The district court reversed an order of the bankruptcy court, Cornelius Blackshear, *Bankruptcy Judge*, filed on June 15, 1989. The bankruptcy court held that the adversary proceeding filed by Cooper against appellees Insurance Company of the State of Pennsylvania ("ICSP"), Kalvin-Miller International, Inc. ("KM") and Kerwick & Curran, Inc. ("K & C") was "core" within the meaning of 28 U.S.C. § 157(b)(2) (1988). It retained jurisdiction. The district court disagreed, holding that the adversary proceeding was merely "related" to Cooper's underlying Chapter 11 petition, and withdrew the reference to the bankruptcy court. The district court also held that withdrawal was required because appellees were entitled to a jury trial on at least some of their affirmative defenses and on some of Cooper's claims. The district court then abstained from addressing the merits of Cooper's claims in favor of ongoing proceedings based on the same operative facts, commenced by ICSP in New York Supreme Court, New York County. Cooper timely appealed to this Court.

On appeal, Cooper asserts that the proceeding is core and that appellees are not entitled to a jury trial. Appellees, in turn, assert that the proceeding is non-core and that their jury demand should be honored. For the reasons stated below, we hold that the proceeding is core, and therefore we reverse the district court. We also hold that appellees are entitled to a jury trial, and that such

trial should be in the bankruptcy court. We therefore remand the case to the bankruptcy court.

We reach our determination of the issue of core jurisdiction in light of *In re Manville Forest Products Corp.*, No. 89-5019, ____ F. 2d ____ (2 Cir. 1990), also decided today, and assume familiarity with that opinion.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Cooper is a toy and costume manufacturer and importer. Facing economic difficulties, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in April 1988. Pursuant to that petition, Cooper submitted a reorganization plan under which, among other things, it covenanted to "keep all of its respective properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards."

Acting to fulfill its responsibility under the plan (which was finally confirmed by the bankruptcy court on April 4, 1989), Cooper retained KM, an insurance broker, to obtain coverage for its various facilities. KM enlisted K & C, another broker, to assist in finding coverage for Cooper. In October 1988 the brokers procured from ICSP a standard commercial property insurance policy for one of Cooper's facilities, located in Georgia. Appellees do not dispute that they were aware of Cooper's Chapter 11 status.

On January 6, 1989, the Georgia facility was hit by fire, resulting in damage that, Cooper claimed, totaled

over $2 million. After an extended investigation, ICSP determined that it was not liable for the loss because of alleged misrepresentations and omissions by Cooper in the policy application; specifically, that Cooper failed to disclose in its application that the facility was used for manufacturing rather than as a warehouse. Moreover, ICSP determined that Cooper exaggerated its loss in the fire when it submitted its claim. That dispute underlies the instant appeal but is not before us directly. We express no view as to its proper disposition.

On April 18, 1989, ICSP formally cancelled its policy with Cooper. That same day, ICSP commenced an action in the New York Supreme Court, New York County. Its complaint alleged three causes of action: (1) that the policy was void *ab initio* due to the misrepresentations in Cooper's application; (2) that it was not liable for the fire loss because of those misrepresentations; and (3) that it was not liable under the policy because of Cooper's exaggerated claim of loss. Cooper sought and, on May 9, received from the bankruptcy court a stay of the state court action and a preliminary injunction requiring ICSP to maintain the policy.

Almost simultaneously, Cooper commenced, in the bankruptcy court, the adversary proceeding that is the subject of the instant appeal. Cooper's complaint contained three counts. The first, against ICSP, requested a declaration that the policy remained in effect, a declaration that ICSP was liable for all losses sustained in the fire, and punitive damages from ICSP of $5 million. The second count, against KM, alleged negligent conduct in obtaining the policy, and requested, if ICSP were found not liable under the policy, that KM be held responsible for the fire and consequential losses. The

third count, against K & C, essentially mirrored the second. ICSP's answer set forth five affirmative defenses. Three of them repeated, almost to the word, the three causes of action in ICSP's state court complaint.

Appellees opposed the bankruptcy court's jurisdiction over the adversary proceeding, and moved the district court for withdrawal of the reference. They also moved to have the state court stay and the preliminary injunction lifted. Rather than rule on the merits of the motion, the district court, Hon. John M. Walker, remanded the case to the bankruptcy court on May 31 for a determination of the question whether the claims in the proceeding were core.

On June 15 the bankruptcy court entered an order holding that the proceeding was core, and retained jurisdiction. It relied primarily on § 157(b)(2)(A) (estate administration) and secondarily on § 157(b)(2)(L) (confirmation of plans).

Appellees then moved in the district court to reverse that order. The court did so in an oral ruling dated July 11, holding that, while the statutory provisions were relevant to the adversary proceeding, the statutory provisions were not sufficiently broad to render the proceeding core. Moreover, the court held that appellees were entitled to a jury trial on at least some of the issues raised. The court also granted the ancillary relief appellees sought: withdrawal of the reference to the bankruptcy court, abstaining from exercising its own jurisdiction, and lifting the stay of the state court proceedings. This appeal followed.

On appeal, the parties agree that the primary issues are (1) whether the adversary proceeding is core, and

(2) whether appellees are entitled to a jury trial, as they have demanded. Cooper does not raise the other issues on which the district court ruled—the decisions to lift the state court stay and to abstain from exercising jurisdiction.

II.

We turn first to the question whether the adversary proceeding is core within the meaning of 28 U.S.C. § 157(b)(2) (1988). As a question of law, we review de novo the district court's determination that the proceeding is non-core. *Brunner* v. *New York State Higher Ed. Servs.*, 831 F.2d 395, 396 (2 Cir. 1987).

(A)

The jurisdiction of the bankruptcy court over core proceedings is set forth in 28 U.S.C. § 157(b)(1) (1988), which provides that "[b]ankruptcy judges may hear and determine . . . all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments." By contrast, any determinations by the bankruptcy court in a non-core proceeding, upon timely objection, are subject to de novo review by the district court. 28 U.S.C. § 157(c)(1) (1988).

In § 157(b)(2), Congress provided a non-exclusive list of proceedings which it deemed core. Like the bankruptcy court, our analysis will focus on § 157(b)(2)(A) ("matters concerning the administration of the estate"). The language of that sub-section could be construed to include almost any matter relating to bankruptcy, but the structure of the statute as a whole does not permit such a construction. Matters that merely concern the

administration of the bankrupt estate tangentially are related, non-core proceedings. *In re Wood*, 825 F.2d 90, 96 (5 Cir. 1987) (Wisdom, J.).

Our attempt to make the general language of § 157(b)(2)(A) more concrete begins with the Supreme Court's plurality opinion in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). At issue in *Marathon* was the provision of the Bankruptcy Act of 1978 which gave the bankruptcy court "jurisdiction over all 'civil proceedings arising under . . . or arising in or *related to* cases under title 11.' " *Id.* at 54 (emphasis in original) (quoting 28 U.S.C. § 1471(b) (Supp. IV 1980)). In order to exercise that jurisdiction, the statute vested bankruptcy courts with "all of the 'powers of a court of equity, law, and admiralty,' " with only very limited exceptions. *Id.* at 55 (quoting 28 U.S.C. § 1481 (Supp. IV 1980)). Despite that broad jurisdictional grant, however, the Act did not give bankruptcy judges Article III status.

In *Marathon*, the underlying cause of action, as here, was breach of contract. The cause of action arose before Northern Pipeline, the debtor, petitioned the bankruptcy court for Chapter 11 reorganization. The debtor, however, did not initiate the action until after the Chapter 11 petition was filed. Under the 1978 Act, therefore, the bankruptcy court had full jurisdiction over the dispute.

The Supreme Court held that while Congress, pursuant to its power under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4, could grant the bankruptcy courts the right to issue final orders in proceedings that were at the core of bankruptcy jurisdiction, primarily the restructuring of the debtor-creditor relationship, it could not give the right to issue such

orders in "private right" claims (e.g., tort and contract), merely because those claims involved a debtor. *Marathon*, *supra*, 458 U.S. at 71. Those traditional common law claims, the Court held, were reserved for Article III courts.

The congressional response to *Marathon* is set forth in § 157. We employ the "traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), to interpret that response. Neither the House nor the Senate issued a report regarding the Bankruptcy Amendments and Federal Judgeship Act of 1984, of which § 157 is a part. The statements of several influential legislators, however, indicate that bankruptcy jurisdiction was to be construed as broadly as possible within the constitutional constraints of *Marathon*. We agree with the First Circuit's analysis of the legislative history. As that court stated,

> "the legislative history of [§ 157] indicates that Congress intended that 'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95 percent of the proceedings brought before bankruptcy judges would be core proceedings. *See* 130 Cong. Rec. E1108-1110 (daily ed. March 20, 1984) (statement of Representative Kastenmeier); *id.* at H1848, H1850 (daily ed. March 21, 1984) (statement of Representative Kindness). They used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as 'Marathon-type' cases, *see, e.g.*, *id.* at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848

> (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of 'a very limited kind,' *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness)."

In re Arnold Print Works, Inc., 815 F.2d 165, 168 (1 Cir. 1987) (Breyer, J.).

Moreover, § 157(b)(3) provides additional support for our conclusion that Congress intended a narrow reading of *Marathon*. That section provides in relevant part that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." We read that as a demonstration of Congress' intent that bankruptcy courts are not precluded from adjudicating state-law claims when such claims are at the heart of the administration of the bankrupt estate.

(B)

With this in mind, our task is to determine whether this adversary proceeding, which arose after Cooper filed its Chapter 11 petition and which is founded on state contract law, falls within "the core of the federal bankruptcy power." *Marathon*, *supra*, 458 U.S. at 71.

Section 301 of the Bankruptcy Code provides:

> "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of

> this title constitutes an order for relief under such chapter."

11 U.S.C. § 301 (1988). The filing of the petition sets in motion several events. Most significant, from the standpoint of the instant appeal, it creates the "estate" for bankruptcy purposes. 11 U.S.C. § 541(a) (1988). The Supreme Court has stated, in construing the direct predecessor to § 541(a), that

> " 'the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' "

Goggin v. *Division of Labor Law Enforcement*, 336 U.S. 118, 125-26 (1949) (quoting *Everett* v. *Judson*, 228 U.S. 474, 479 (1913)); *see also Kohn* v. *Myers*, 266 F.2d 353, 355 (2 Cir. 1959); *Lockhart* v. *Garden City Bank & Trust Co.*, 116 F.2d 658, 661 (2 Cir. 1940). Moreover, in addition to creating estate property, the filing date adjusts "the rights of others connected with the proceeding." King, 4 Collier on Bankruptcy ¶ 541.04, at 541-22 (15th ed. 1989). Logically, a post-petition contract that has as its subject matter an estate asset must be analyzed differently than one arising pre-petition.

The First Circuit, in *Arnold Print Works*, *supra*, recently held that post-petition contract claims are core. *Arnold Print Works* observed that, historically, trustees and debtors-in-possession (Cooper's status) have been viewed for various purposes as officers of the bankruptcy court. 815 F.2d at 169-70. Post-petition contracts

with the debtor-in-possession, therefore, are integral to the estate administration from the date they are entered into. *Id.*; *In re Baker & Getty Financial Servs. Inc.*, 88 B.R. 137, 139-40 (Bankr. N.D. Ohio 1988); *In re Franklin Computer Corp.*, 60 B.R. 795, 800-01 (Bankr. E.D. Pa. 1986). We find the reasoning of *Arnold Print Works* especially persuasive in light of the facts of the instant appeal: the Georgia facility was an asset of the estate; Cooper's reorganization plan promised adequate insurance for the estate assets; the bankruptcy court's confirmation of the plan was premised on adequate insurance; and appellees were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. *Cf. In re Mike Burns Inn, Inc.*, 70 B.R. 863 (Bankr. D. Mass. 1987) (post-petition claim on insurance policy acquired post-petition is core); *In re Heaven Sent, Ltd.*, 50 B.R. 636 (Bankr. E.D. Pa. 1985) (action to maintain insurance is core). It is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration.

We hold, therefore, that the bankruptcy court has core jurisdiction, pursuant to § 157(b)(2)(A), over contract claims under state law when the contract was entered into post-petition. The adjudication of such claims is an essential part of administering the estate. We read *Marathon* to apply to claims arising *pre-petition*, and decline to apply that ruling to claims involving contracts entered into post-petition. Similarly, we distinguish those lower court cases cited by appellees that, relying on *Marathon*, hold pre-petition claims to be non-core. *E.g.*, *In re Pied Piper Casuals, Inc.*, 65 B.R. 780 (S.D.N.Y. 1986); *In re Blue Point Carpet,*

Inc., 86 B.R. 327 (Bankr. E.D.N.Y. 1988); *Acolyte Electric Corp.* v. *City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986), *aff'd*, No. 86-0329 (E.D.N.Y. 1987).

We are aware that language from opinions of two other circuits may be read to disagree with our holding. In one, *In re Castlerock Properties*, 781 F.2d 159 (9 Cir. 1986), the contract apparently existed pre-petition. It is therefore unlikely that its holding that the proceeding in question was non-core conflicts with our holding on the instant appeal. In any event, we decline to follow the sweeping statement in *Castlerock* that

> "state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)(-)(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, sections § [sic] 157(b)(2)(A) and (O)."

Id. at 162. Such a reading of the statute in our view would render the general provisions null.

The Fifth Circuit stated in *In re Wood*, *supra*, 825 F.2d at 97, that "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." The court held that a claim under state law arising from a post-petition dispute did not fit either category. The instant appeal does not fit in the first category. We hold that the timing of a dispute may render it uniquely a bankruptcy case. To the extent that *Wood* conflicts with our holding, we decline to follow it.

Having held that the bankruptcy court has jurisdiction over the adversary proceeding as a core matter, we turn to the question whether appellees are entitled to a jury trial on the factual issues raised, i.e., whether Cooper misrepresented the nature of the facility in its insurance application and whether it exaggerated its loss from the fire.

(A)

In its decision, the district court stated that "[t]he defendants are entitled to a jury trial with respect to at least some of the debtor's claims and their affirmative defenses." That ruling made no reference to *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782 (1989), decided only two weeks earlier. Since that case weighs heavily on the instant appeal, we address it in depth.

In *Granfinanciera*, the respondent, a Chapter 11 trustee, sued the petitioners in the bankruptcy court to recover fraudulent transfers allegedly made by the bankrupt corporation. Section 157(b)(2)(H) explicitly provides that actions to recover fraudulent conveyances are core proceedings. The bankruptcy court therefore held that it could hear the action without a jury, despite the petitioners' demand for a jury trial. The district court and the court of appeals both affirmed. The Supreme Court, however, in a somewhat opaque opinion, reversed.

One aspect of the Supreme Court opinion is clear—that is, when a party makes a jury demand for a claim that is inherently legal, "Congress cannot eliminate [that] party's Seventh Amendment right to a jury trial

merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Id.* at 2800. In other words, we are required to analyze the underlying nature of the claim without regard to Congress' designation of that claim as core.

The aspect of *Granfinanciera* that we find difficult to decipher is its expression of the Court's view whether the bankruptcy court can hold jury trials in proceedings that are both legal and, at the same time, core pursuant to § 157(b). To be sure, the Court explicitly left that question open. *Id.* at 2802. But in its discussion of the questions it did address, there are several passages that can be construed as affecting the determination of that question.

One such passage is the discussion of the "public rights-private rights" dichotomy. To review, *Marathon* appeared to hold that Article I courts could adjudicate claims at the core of bankruptcy because such claims were public rights, and central to Congress' constitutional bankruptcy power. *Marathon*, *supra*, 458 U.S. at 71; *see also In re Kaiser*, 722 F.2d 1574, 1580 & n.2 (2 Cir. 1983). We say "appeared" only because *Granfinanciera* equivocated on that statement. 109 S. Ct. at 2797-98 & n.11. *Granfinanciera*, in turn, premised its holding that a fraudulent conveyance action carries a Seventh Amendment right to a jury trial, at least in part, on its conclusion that such action is a private right. *Id.* at 2795-98. If, therefore, the Supreme Court held that all adversary proceedings sounding in law are private rights of action, a determination that the instant action is legal would compel us to hold that the proceeding is not core.

Fortunately, we need not read *Granfinanciera* so broadly. That opinion also contains several passages indicating the Court's contemplation that its holding may result in jury trials in the bankruptcy court. For example, the Court stated that

> "one cannot easily say that 'the jury would be incompatible' with bankruptcy proceedings, in view of Congress' express provision for jury trials in certain actions arising out of bankruptcy litigation. And Justice White's claim that juries may serve usefully as checks only on the decisions of judges who enjoy life tenure overlooks the extent to which judges who are appointed for fixed terms may be beholden to Congress or executive officials, and thus ignores the potential for juries to exercise beneficial restraint on their decisions."

Id. at 2801 (citations omitted). As this passage indicates, Justice White's dissenting opinion understood the majority as leaving the door open for jury trials in bankruptcy and criticized the majority for doing so. *Id.* at 2810-12 (White, J., dissenting).

In view of the foregoing, we find that *Granfinanciera* does not foreclose the possibility of jury trials in the bankruptcy court. We therefore will analyze the question anew; addressing first whether the claims on the instant appeal are inherently legal, and second whether any statutory or constitutional provision bars the bankruptcy court from conducting jury trials.

In any action commenced in a federal court, "the right to a jury trial . . . is to be determined as a matter of federal law." *Simler* v. *Conner*, 372 U.S. 221, 222 (1963) (per curiam). Before we analyze the federal law applicable to the issues raised on the instant appeal, we will review briefly the relevant facts. The parties do not dispute that, due to the fire, ICSP's alleged obligation under the policy has matured. ICSP believes that Cooper defrauded it, and accordingly has sued in the state court to have the policy rescinded and to have its obligations declared void. Cooper then sued in the bankruptcy court for a declaration that the policy was still valid and that ICSP is liable for the damages Cooper claims. Alternatively, Cooper claims that if the policy is declared void, the fault lies with KM and K & C, rendering them liable for Cooper's losses.

We reject Cooper's contention that, merely because ICSP arguably is seeking rescission, the nature of the action is equitable. We agree with Professor Moore, who states that when

> "the insurer's liability under the policy has matured, the basic issues are legal. This is true whether the insurer sues to cancel the policy and the beneficiary counterclaims for recovery on the policy, or the beneficiary sues for recovery on the policy and the insurer defends and/or counterclaims for cancellation on the ground of fraud."

5 Moore's Federal Practice ¶ 38.23, at 38-200-01 (2d ed. 1988) (footnotes omitted); *see also American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, 212 (1937); *Woods* v. *National Life and Accident Ins. Co.*, 347 F.2d 760, 767

(3 Cir. 1965); *Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F.2d 62, 65 (3 Cir.), *cert. denied*, 320 U.S. 777 (1943).

That the claim may be construed as a request for a declaratory judgment does not change matters. It is settled law that in a declaratory action, "the nature of the underlying dispute determines whether a jury trial is available." *In re Petition of Rosenman & Colin*, 850 F.2d 57, 60 (2 Cir. 1988).

The argument of KM and K & C in favor of a jury trial is even more compelling. Cooper seeks damages from them for alleged negligence and malpractice. It is difficult to imagine a claim that is more inherently legal. Cooper makes little attempt to assert the contrary. The conclusion that "in an ordinary tort action . . . the right of trial by jury is guaranteed by the Constitution," *United States* v. *Fotopulos*, 180 F.2d 631, 634 (9 Cir. 1950), is so obvious that it hardly needs belaboring.

(C)

Since appellees have a right to a jury trial in this core proceeding, this brings us to the issue whether the bankruptcy court has statutory and constitutional authority to conduct such trials.

The relevant statutory provision, 28 U.S.C. § 1411 (1988), offers almost no guidance. The part of the statute applicable to voluntary petitions provides only that "this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." *Id.* at § 1411(a). This provision does not even make clear whether jury trials are

afforded for other actions, let alone the proper forum for those trials. Of course, *Granfinanciera* has clarified the former issue, holding that jury trials are to be afforded for all legal actions.

Despite the lack of a specific statutory provision, we nevertheless hold that the bankruptcy courts may conduct jury trials in core proceedings. This is the position taken by the majority of courts which have considered the issue. Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967, 1027-34 (1988) (citing cases). The cases in support of this view are too numerous to cite; we mention only a few of the more comprehensive ones. *Dailey* v. *First Peoples Bank of N.J.*, 76 B.R. 963 (D.N.J. 1987); *In re McCormick*, 67 B.R. 838 (D. Nev. 1986); *In re Kroh*, 1989 WL 153045 (Bankr. W.D. Mo., Dec. 18, 1989); *In re Data Compass Corp.*, 92 B.R. 575 (Bankr. E.D.N.Y. 1988).

Our holding rests on two separate but related provisions. The first provision is 28 U.S.C. § 151 (1988), which states that "[e]ach bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit or proceeding." The second provision is § 157(b), which, as stated previously, gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. *Granfinanciera* teaches that such proceedings, if legal in nature, are subject to the Seventh Amendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders. Construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns.

At present, there is no specific procedure in the Bankruptcy Rules providing for jury trials. For several years Rule 9015 prescribed a procedure for trials, but that rule was withdrawn in 1987 because bankruptcy courts were relying on it for substantive support for their right to conduct the trials. The Committee noted that " '[i]n the event the courts of appeals or the Supreme Court define a right to jury trial in any bankruptcy mattes [sic], a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules.' " Gibson, *supra*, 72 Minn. L. Rev. at 1030 n.296 (quoting Committee Note to Abrogation of Bankr. R. 9015). In the interim, many courts have relied on local rules or Rule 38, the analogous Federal Rule of Civil Procedure. *E.g.*, *In re Kroh*, *supra*; *In re 222 Liberty Assocs.*, 99 B.R. 639, 643 (Bankr. E.D. Pa. 1989); *In re W.G.M.C., Inc.*, 96 B.R. 5, 6 (Bankr. D. Me. 1989); *In re Jackson*, 90 B.R. 126, 133 (Bankr. E.D. Pa. 1988).

(D)

The first possible constitutional hurdle to jury trials in the bankruptcy court is the Seventh Amendment, specifically the requirement that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. No reviewing court therefore may "redetermine facts found by the jury." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). Thus, the Seventh Amendment may well render unconstitutional jury trials in non-consensual non-core proceedings, because of the requirement that findings of fact by the bankruptcy court be reviewed de novo by the district court. 28 U.S.C. § 157(c)(1). Dis-

trict court review of final orders in *core* proceedings, however, is limited to the analogous review that courts of appeals have over district courts. 28 U.S.C. § 158 (1988); *In re Daniels-Head & Assocs.*, 819 F.2d 914, 918-19 (9 Cir. 1987). Since the jury verdict in a core proceeding is subject only to the traditional standards of appellate review, such proceeding does not violate the Seventh Amendment.

(E)

Finally, we reach the question whether jury trials in the bankruptcy court violate Article III of the Constitution. The essential predicate question, even more fundamental, is whether the statutory authority of bankruptcy judges to enter final judgments in core proceedings runs afoul of Article III. The parties did not raise this issue on appeal, limiting themselves to the question of the interpretation of § 157(b). The conclusion that core jurisdiction is constitutional, however, is implicit in our analysis in Section II of this opinion. That is particularly true in light of our holding that *Marathon*, a case decided under Article III, is to be distinguished from the instant appeal. We therefore assume for the sake of this appeal that § 157(b) passes muster under Article III. *Cf. Arnold Print Works*, *supra*, 815 F.2d at 169 (holding explicitly that Article III "permits a non-Article III bankruptcy court to adjudicate post-petition claims related to administration or liquidation of a debtor's estate because the claims are both historically and factually distinguishable from those at issue in *Marathon*").

If bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate

Article III. The primary purpose of this Article is to ensure a federal judiciary free from pressure from the other branches of government. *E.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986); *United States* v. *Will*, 449 U.S. 200, 218 (1980). If anything, jurors are less likely to feel pressure from the executive and legislative branches than are bankruptcy judges, who depend on the other branches for reappointment to office. *Granfinanciera*, *supra*, 109 S. Ct. at 2801. Additionally, the practice of jury trials in Article I courts has been upheld when the authority of the Article I judges does not otherwise run afoul of Article III. *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) (local District of Columbia judges); *Collins* v. *Foreman*, 729 F.2d 108 (2 Cir.) (federal magistrates), *cert. denied*, 469 U.S. 870 (1984). We hold, therefore, that jury trials in core proceedings in the bankruptcy court do not violate Article III.

IV.

To summarize:

We hold that the adversary proceeding between Cooper and appellees is core within the meaning of § 157(b), and that the proceeding is properly before the bankruptcy court. We further hold that the issues underlying the proceeding are legal, entitling appellees to a jury trial, as they have demanded. Finally, finding no statutory or constitutional bar, we hold that the jury trial should be in the bankruptcy court.

Reversed and remanded.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

BEN COOPER, INC.,

Plaintiff,

v. M 47

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.

---------- x

July 11, 1989
11:30 a.m.

Before:

HON. LOUIS L. STANTON

District Judge

ORAL DECISION

APPEARANCES

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VICTORIA A. STEWART

(In open court)

THE COURT: Based on the written submissions and the oral arguments of counsel, it is clear to me that the adversary proceeding commenced on May 9, 1989, by Ben Cooper, Inc., against the Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc., and Kerwick & Curran, Inc., is not a core proceeding under 28 U.S. Code Section 157.

Core proceedings are those within bankruptcy cases which seek the creation, recognition, determination or adjudication of rights which do not exist independently from Title 11 or the bankruptcy case itself.

Stated differently, core proceedings are those which spring from the operation and application of the bankruptcy code itself. It is a term which is meant to encompass those proceedings which would not exist in the absence of the bankruptcy code.

In contrast, non-core or related proceedings are those which could have been brought in the district court or state court had there been no bankruptcy case filed. They exist irrespective of the fact of the bankruptcy.

The adversary proceeding here raises only state law issues, primarily whether the insurance company is liable for the losses sustained in a fire at the Rossville, Georgia plant, and if the insurance company is not liable, whether Kalvin-Miller or Kerwick & Curran are liable.

Now, of course, the outcome of that proceeding may have an economic impact on the consummation of the plan which has been approved by Judge Blackshear on April 4, but it does not follow that it is therefore a core proceeding under either Section 157(b)(2)(A) which refers to matters concerning the administration of the estate, or section 157(b)(2)(L) which

concerns confirmations of plans, and to hold that it is a core proceeding under either of those clauses would read those clauses too broadly.

An action is not a core proceeding simply because its outcome can result in funds being brought into the estate. Rather, that connection makes it a related proceeding. In the Blue Point Carpet case the court pointed out that even where a breach of contract action is necessary to fund a reorganization, treatment of the matter as a core proceeding is unjustified since otherwise even the Marathon case would have constituted a core proceeding, and under that construction the bankruptcy amendments of 1984 would be as unconstitutional as was the predecessor statute.

The proceeding not being a core proceeding, it cannot be rendered a core proceeding by any provisions of the plan. This raises the question whether the reference to the bankruptcy court should be withdrawn. Title 28 United States Code Section 157 (d) states that a district court may withdraw in whole or in part any proceeding referred to under that section on timely motion of any party for cause shown.

The propriety of withdrawal in this case centers on the dispute whether the defendants are entitled to a jury trial in the adversary proceeding. Ben Cooper's complaint in the adversary proceeding contains three counts. The first seeks a judgment that the policy issued by the insurance company is still in effect and that the insurance company is liable for Ben Cooper's losses sustained in the fire at the Rossville, Georgia plant. It seeks damages of $2 million and punitive damages of $5 million.

The second and third counts respectively argue that Kalvin Miller and Kerwick & Curran were negligent in the roles that they played in helping Ben Cooper obtain insurance. The defendants' answers contain jury demands.

The defendants are entitled to a jury trial with respect to at least some of the debtor's claims and their affirmative defenses. The majority of cases hold that Congress did not intend that

bankruptcy judges preside over jury trials in non-core proceedings, since the requirement of de novo review in a district court would be incompatible with the conduct of a jury trial in the bankruptcy court. Review in the district court would then have to be by a de novo jury trial, leading to a meaningless duplication.

The necessity of preserving the defendants' right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157 (d). The reference being withdrawn, the question is whether the district court should abstain from hearing the matter and allow it to proceed in the state court.

The relevant statute, 28 United States Code Section 1334(c)(2), provides that the district court shall abstain from hearing a non-core proceeding based on a state law or a state law cause of action if an action has been commenced in the state court and that action can be timely adjudicated in a state forum of appropriate jurisdiction.

Section 1334(c)(1) permits a district court to abstain from hearing either a core or a non-core proceeding in the interests of justice or in the interests of comity with state courts or respect for state law.

As I have mentioned, the adversary proceeding here is a non-core proceeding which raises only state law issues. Pursuant to Judge Blackshear's orders, the parties have already conducted expedited discovery which pertains both to the adversary proceeding and to the pending state court action. There has been no showing that timely adjudication is not available in the state court, and this court will abstain from hearing the adversary proceeding.

The final matter relates to the bankruptcy court's preliminary injunction which on May 24 prohibited the insurance company from cancelling its policy with Ben Cooper and prosecuting its state court action.

In this circuit the standard for preliminary injunctive relief requires a showing of irreparable harm and either the likelihood of success upon the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

At this stage Ben Cooper's likelihood of success on the merits with respect to the insurance company's cancellation of its policy is at best a wide open question. There is no persuasive showing that it has a likelihood of success on the merits at this point. It may prevail or it may not. There are certainly sufficiently serious questions going to the merits to make them a fair ground for litigation.

As far as the balance of hardships is concerned, these tip in favor of the insurance company, not in favor of Ben Cooper. Unlike Judge Blackshear, I do not see how the insurance company's cancellation of its policy would jeopardize Ben Cooper's ability to pay out to its creditors. If the insurance company cancelled the policy today, such an action should have no effect on Ben Cooper's collecting $2 million or $5 million if it is entitled to do that from the insurance company for the January fire, nor would it increase otherwise, or decrease the assets available to Ben Cooper to pay its creditors.

However, by way of the injunction, the insurance company is presently being held to a risk which it says it never contracted to underwrite and for which it is receiving an inadequate premium. Ben Cooper argues that it will be difficult and may be impossible for it to obtain other insurance because of its financial situation as well as because of the insurance company's charges of deceit in the state court action. However, that is problematical. In any event, that situation has not been established as one with which it is just to tax the insurance company.

Even if it is the case that no other company wishes to assume the Ben Cooper risk, that does not justify inflicting that risk on

this insurance company merely because Ben Cooper has covenanted with its creditors that it will maintain insurance on its property. The obtaining of that insurance should be left to open market forces.

Accordingly, that portion of the bankruptcy court's order of May 24, 1989, preventing the insurance company from cancelling its insurance policy is vacated. In light of my decision to abstain from hearing the non-core adversary proceeding commenced by Ben Cooper, the remaining portion of the May 24, 1989 order which enjoins the insurance company from prosecuting the state court action is also vacated.

Is there anything further on this case?

MR. GINSBURG: Your Honor?

THE COURT: Yes.

MR. GINSBURG: In the event that Ben Cooper decides to appeal from this decision, assuming it is appealable, what would the form of request for a stay of your Honor's order —

THE COURT: I am sure it would be whatever the federal rules provide.

MR. GINSBURG: I would ask you now, then, preliminarily for a stay of your order to admit an emergency appeal to the Second Circuit.

THE COURT: I will grant you a 24-hour stay to explore your remedies and file whatever papers you wish to file.

MR. GINSBURG: Thank you. May I request a stay until the close of business tomorrow?

THE COURT: Yes.

(Proceedings adjourned)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter
of

	Case No.
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO.,	88 B 10547
AIMWELL PRODUCTS, INC.	88 B 10546
BEN COOPER SALES, CORP.	88 B 10770

Debtors,

June 15, 1989

United States Custom House
One Bowling Green
New York, New York 10004

s/c Debtor v. The Insurance Company of the State of Pa. –
Pretrial Conference
M/M for Determination of Core v. Non-Core

B E F O R E :

HON. CORNELIUS BLACKSHEAR,

Bankruptcy Judge.

* * *

THE COURT: Very well. Based upon the papers that this Court has read as well as the oral arguments, I think most parties can understand how I came to the Bench this morning. I have not been convinced otherwise.

This Court's mind is still such that this is a core matter. It's core because of the following reasons, under 157(b)(2)(a), that this is a matter that is inextricably intertwined with the

administration of the case. And it is because it was an issue that it was a provision under the plan that this case, under which this case was confirmed, that this was going to be a situation where the Debtor was going to maintain insurance on the property.

Furthermore, it deals somewhat, not quite as strong, with 157(b)(2)(1), the reason it doesn't, this Court expressly within the plan of consummation, retained jurisdiction, because of disputes such as this dispute. And that is a phrase that is normally put in the bankruptcy plan of consummation, this Court is shocked when it is not, it's normally put in, so the Court can go on to substantive consummation and then thereby closing the case, which refers back to the administration of the case.

We do not need these cases lingering. And it's been the history of this Court, that the Court best equipped to handle these issues in an expedited basis is the Court that confirmed the case, that is familiar with the facts and backgrounds of the case, so that time can move on quickly to resolve the issue.

So for this reason, this Court finds that this is a core matter, it is a core matter for the reasons stated, and that other issues can await the District Court's determination as to whether or not it may wish to withdraw the reference, notwithstanding the fact that this Court has determined that it is a core matter.

* * *

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district

court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 1411. Jury trials

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

Docket No. 89-1784

JUN
JOSEPH F. SPA
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

vs.

BEN COOPER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a bankruptcy court has core jurisdiction, pursuant to 28 U.S.C. § 157(b)(2)(A), over state law claims where the contract was entered into knowingly with a debtor under the jurisdiction of the bankruptcy court.

II. Whether a bankruptcy court may conduct a jury trial in core proceedings.

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RULE 29.1 STATEMENT

Respondent has no parent companies nor any subsidiaries which are not wholly-owned subsidiaries.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

vs.

BEN COOPER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The petition does not present any issues which are appropriate for review by this Court. The Court of Appeals for the Second Circuit, in its opinion below,[1] correctly held that the adversary proceeding commenced by respondent was a core proceeding and that the core proceeding should be referred to the bankruptcy court for a jury trial. The arguments cited in the petition are insufficient to require review.

[1] The decision of the Court below is reported at 896 F.2d 1394 (2d Cir. 1990), and is reprinted in the appendix to the petition at A-1. All references thereto will be to the appropriate pages in the appendix.

COUNTER-STATEMENT OF THE CASE

Pursuant to Rule 15.1, respondent respectfully points out the following misstatements and omissions in the petition.

Facts

Most importantly, the petition fails to make reference to the fact that respondent's plan of reorganization contained an express requirement that it maintain adequate insurance coverage. As the Second Circuit noted:

> Cooper submitted a reorganization plan under which, among other things, it covenanted to "keep all of its respective properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards." [A-4]

This fact underlies the Second Circuit's holding that the adversary proceeding is core and is essential to consideration of the petition.

In addition, it should be noted that respondent is not merely a "costume importer/manufacturer" but is a manufacturer and importer of toys as well (A-4).

Furthermore, the petition (p.4) characterizes the fire which gave rise to the insurance claim underlying this dispute as a "small" fire. The magnitude of the fire is a fact in dispute between the parties.

Statutes

In addition to the statutes referenced in the petition, the following statutes are also involved in this appeal: 28 U.S.C. § 151; Bankruptcy Code Sec. 301 (11 U.S.C. § 301); and Bankruptcy Code Sec. 541(a)(11 U.S.C. § 541). Copies of the foregoing statutes are contained in an appendix hereto, beginning at page A-35.[3]

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[3] The petition includes an appendix containing pages A-1 through A-34.

REASONS FOR DENYING THE WRIT

POINT I

THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY HELD THAT A BANKRUPTCY COURT HAS CORE JURISDICTION, PURSUANT TO 28 U.S.C. § 157(b)(2)(A), OVER STATE LAW CLAIMS WHERE THE CONTRACT WAS ENTERED INTO POST-PETITION

After reviewing this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as well as the statutory framework contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), which was Congress' response to *Marathon*, the Second Circuit held that the bankruptcy court has core jurisdiction, pursuant to 28 U.S.C. § 157(b)(2)(A), over contract claims under state law when the contract was entered into post-petition (A-12). This holding is well supported by the applicable statutes and case law and is not in need of review by this Court.

In its review, the Second Circuit focused on subsection A of 28 U.S.C. § 157(b)(2) – "matters concerning administration of the estate" (A-7).[3] As to such matters which fall within the "core" jurisdiction of the bankruptcy court, a bankruptcy judge "may hear *and* determine" such proceedings. 28 U.S.C. § 157(b)(1) (emphasis added).

In finding the subject adversary proceeding to be a "core" proceeding within the meaning of 28 U.S.C. § 157, the Second Circuit recognized the crucial difference between a dispute arising before the filing of the bankruptcy petition and a dispute arising after the filing of the petition. With the commencement

[3] The petition (p.10) incorrectly notes that the Second Circuit's decision did not involve any enumerated section of § 157(b)(2).

of the bankruptcy case, the filer becomes a "debtor" and the debtor's assets become the "estate". 11 U.S.C. § 301; 11 U.S.C. § 541(a). The "line of cleavage" is thus drawn, *see Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118, 125 (1949), and, as the Second Circuit acknowledged, post-petition activities must be analyzed differently from pre-petition activities (A-11).

In the case at bar, the Second Circuit noted that the facility at which the fire took place was an asset of the estate; the debtor's plan of reorganization expressly required that the debtor maintain adequate insurance; the confirmation of the plan was premised on the maintenance of adequate insurance; and the appellees (petitioners) were fully aware that they were dealing with a debtor (A-12). Under these circumstances, the Court below found that "(i)t is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." (A-12). *Cf. Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165 (1st Cir. 1987); *Burns v. Massachusetts Property Ins. Underwriting Assoc. (In re Mike Burns Inn, Inc.)*, 70 Bankr. 863 (Bankr. D. Mass. 1987); *L.A. Clarke and Son, Inc. v. Bullock Construction, Inc. (In re L.A. Clarke and Son, Inc.)*, 51 Bankr. 31, 33 (Bankr. D.C. 1985) ("All the operative events . . . occurred during the period after the Debtor's Chapter 11 petition was filed, while the Debtor was a Debtor-in-possession, and they all involved the activities of the Debtor as Debtor-in-possession operating under the aegis of this Court's protection and authority.").

Contrary to petitioners' argument, there is nothing arbitrary about the test applied by the Second Circuit. A debtor-in-possession is an entity created by the bankruptcy laws. It is hardly arbitrary to hold that those who *knowingly* contract with a debtor-in-possession be held accountable before the court charged with protecting the debtor. Indeed, this is the only holding consistent with the statutory scheme.

The Second Circuit's holding is also entirely consistent with this Court's decision in *Marathon*. The Court in *Marathon*

held that Congress could grant bankruptcy courts the right to issue final orders in actions that were at the "core of the federal bankruptcy power", but not in those actions which involved merely "state-created private rights". *Id.*, 458 U.S. at 71. The dispute in *Marathon* arose pre-petition; thus, the holding in *Marathon* is entirely consistent with the holding of the Court below.[4] *See, e.g., In re Arnold Print Works, Inc., supra*, 815 F.2d at 165-166 ("In our view, the matter of timing and the relation to judicial administration of the bankrupt's estate make a critical constitutional difference between *Marathon* and the present case."); *In re Mike Burns Inn, Inc., supra*, 70 Bankr. at 867 ("the instant case is distinguishable from *Marathon* because the Debtors are suing . . . for post-petition breach of contract and deceit, matters clearly affecting this Court's administration of the Debtors' estates").

A pre-petition cause of action fits more readily within the Court's description of "private" rights. However, once the "line of cleavage" is crossed, i.e., once the bankruptcy petition is filed, post-petition contracts fit squarely within the core of the Federal bankruptcy power which, in this case, concerns the administration of the estate.[5]

The other circuit-level cases relied upon in the petition are also readily distinguishable and do not reflect a true disagreement among the circuits. As the Court below noted, the Ninth Circuit's decision in *Piombo Corp. v. Castlerock Properties, Inc. (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986) was arguably based on a pre-petition contract (A-13); in addition, the sweeping pronouncement contained therein would emasculate the list of core proceedings contained in 28 U.S.C. § 157(b)(2).[6] As such, it must be discounted.

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[4] Of course, this was how the Second Circuit distinguished *Acolyte Electric Corp. v. City of New York*, 69 Bankr. 155 (Bankr. E.D.N.Y. 1986), *aff'd*, 1987 WL 47763 (E.D.N.Y. 1987), a case relied upon by appellees below and in their petition.

[5] Contrary to petitioner's statement (p.10), the Second Circuit did in fact consider the state law nature of the underlying dispute (A-10). Clearly, the fact that the adversary proceeding involves issues of state law is not determinative. *See* 28 U.S.C. § 157(b)(3).

Similarly, *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987) relies on a far narrower reading of § 157 than is indicated by the legislative history of BAFJA; to the extent that *Wood* conflicts with the holding of the Court below, it should also be discounted. Contrary to petitioners' argument (p.12), the nature of the underlying dispute cannot be considered in a vacuum; the effect of the dispute on administration of the estate must also be considered. In addition, although not specifically addressed by the Second Circuit, it could be argued that the Second Circuit's finding is consistent with *Wood*, since, as a post-petition claim, this proceeding could not have arisen *except* in the context of a bankruptcy case.

In holding that a post-petition contract is an essential part of estate administration, the Court below was merely acknowledging the intent of Congress in enacting BAFJA – to ensure that proceedings "core" to the bankruptcy be determined by the bankruptcy court. This holding should not be disturbed.

• The Ninth Circuit would, in effect, re-write the statute to eliminate subsections A (administration of the estate) and O (the "catch-all" provision).

POINT II

THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY RULED THAT A BANKRUPTCY COURT MAY CONDUCT A JURY TRIAL IN CORE PROCEEDINGS

In ruling that a bankruptcy court may hold a jury trial in a core proceeding, the Court below decided the issue that had been hinted at but left open by this Court in *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782 (1989). In so doing, the Second Circuit did the only thing it could do under the circumstances – finding no statutory or constitutional prohibition, the Court below came to the only conclusion consistent with the statutory scheme. Its decision need not be reviewed.

In *Granfinanciera*, the Court held that Congress could not eliminate a party's Seventh Amendment right to a jury trial. *Id.*, 109 S.Ct. at 2800. However, the Court found it unnecessary to explicitly rule on the jury trial issue. *Id.*, 109 S.Ct. at 2802. There is no reason to believe, however, that if this Court had so ruled, it would have done so any differently than the Second Circuit.

Since *Granfinanciera* did not foreclose the possibility of jury trials in bankruptcy court (and, indeed, can be read, at least to some extent, to favor that possibility, *see*, *Id.*, 109 S.Ct. at 2801), the Court below examined the statutory and constitutional authority (or lack thereof) for jury trials in bankruptcy court.

Finding little guidance in the only statute which explicitly addresses jury trials (28 U.S.C. § 1411), the Court turned to the sections granting jurisdiction to the bankruptcy court. Section 151 gives bankruptcy judges "the authority conferred under this chapter with respect to any action suit, or proceeding." 28 U.S.C. § 151. Section 157(b) gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. 28 U.S.C. § 157(b). The Second Circuit

believed that the only way to reconcile these concerns, consistent with *Granfinanciera*, was to permit the bankruptcy court to conduct jury trials (A-19).

Next, the Court below turned to the Constitution. The Court found no impediment in the Seventh Amendment, at least as to core proceedings, since the statutory provisions do not require *de novo* review of determinations in core proceedings (A-21). *See* 28 U.S.C. § 157(b)(1). Contrary to petitioners' statement (p.15), the Court below never acknowledged a Seventh Amendment problem with respect to *core* proceedings, but only with respect to *non-core* proceedings (A-20).

As for Article III, the Second Circuit reasoned that since bankruptcy courts have the constitutional power to enter final judgments without violating Article III, jury verdicts likewise would not be violative of Article III (A-21-22).[7]

The recent decision of the United States Court of Appeals for the Eighth Circuit, *In re United Missouri Bank of Kansas City, N.A.*, __ F.2d __, 1990 WL 48555 (8th Cir. 1990), which disagreed with the decision reached in the Court below, does not provide sufficient reason for review.[8] The Eighth Circuit took an extremely narrow view of the 1984 amendments, ignoring Congress' intent to broaden bankruptcy court jurisdiction to its constitutional limits.[9] *See, e.g., In re Arnold Print Works, Inc., supra*, 815 F.2d at 168 ("the legislative history of the new statute indicates that Congress intended that 'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits.").

---

[7] In addition, the Court below noted (A-22) that Article I judges have been granted the power to conduct jury trials in other contexts. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Collins v. Foreman*, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984).

[8] Indeed, though disagreement among the Circuits is one reason the Court will consider in ruling on a petition for certiorari, such factor is "neither controlling nor fully measure[s] the Court's discretion." Rule 10.1.

[9] Indeed, the Eighth Circuit did not even consider the constitutional issues, but instead based its decision on its narrow view of the statutory scheme. *Id.*, 1990 WL 48555, n. at 6.

In addition, the Eighth Circuit failed to recognize what is, in fact, the crux of the Second Circuit's decision on the jury trial issue – the only way to reconcile this Court's holding in *Granfinanciera* with Congress' language expressed in 28 U.S.C. § § 151 and 157 is to find, as the Second Circuit did, that Congress at least implicitly intended that jury trials be conducted in the bankruptcy courts. There is every reason to believe that if this issue were properly before the Court in *Granfinanciera*, the Court would have reached the same conclusion as the Second Circuit. *See*, *Id.*, 109 S.Ct. at 2801.[10]

Therefore, no further elaboration is necessary and the jury trial issue need not be reviewed.

[10] As noted by the Court below, the majority of courts which have addressed the issue have found that bankruptcy courts may conduct jury trials (A-19).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: June 6, 1990

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF IN REPLY

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June 12, 1990

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' BRIEF IN REPLY

POINT I

RESPONDENT'S CONTENTION THAT THE DECISION BELOW IS CONSISTENT WITH *MARATHON* IGNORES THE SUPREME COURT'S RATIONALE

Respondent's argument in Point I of its opposition brief merely tracks the reasoning of the court below, offering no further explanation for its conclusion that the controversy in this case is a "core" matter. Respondent argues that the decision below is "entirely consistent" with this Court's pronouncement in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In effect, Respondent dismisses *Marathon* on the sole basis that it involved a pre-petition controversy. Yet Respondent's analysis ignores this Court's rationale in *Marathon* which established a dichotomy between the two types of claims related to and arising under bankruptcy proceedings (i.e., private rights as distinguished from rights core to the federal bankruptcy power).

In *Marathon*, the Court gave no indication that the timing of an underlying contract's formation or a claim arising therefrom would govern whether a matter is deemed core or non-core. While disputes arising from post-petition contracts may or may not have a greater impact on a bankruptcy estate than those arising from pre-petition contracts, *Marathon* and its progeny dictate that one examine the nature of a claim to determine whether it is core. The matter at issue, involving ordinary state law contract claims, concerns only private rights. Under *Marathon* such controversies are not core.

POINT II

THE EIGHTH CIRCUIT'S RECENT DECISION CREATES FURTHER UNCERTAINTY AMONG THE CIRCUITS ON THE CRITICAL ISSUE LEFT UNANSWERED IN *GRANFINANCIERA*

Respondent's discussion concerning the power of a bankruptcy court to conduct a jury trial is limited to a defense of the Second Circuit's ruling in the case at bar and a criticism of the Eighth Circuit's ruling in *In Re United Missouri Bank of Kansas City, N.A.*, No. 89-2981, 1990 WL 48555 (8th Cir. April 23, 1990) (to be reported at 901 F.2d 1449).[1] Respondent does not dispute the fact that there is a true difference among the circuits, a difference which is clearly highlighted by the Eighth Circuit's comments in *United Missouri Bank*. Respondent is, nevertheless, unwilling to concede that the split between the Second Circuit and the Eighth Circuit on the jury trial issue would alone consitute a compelling reason for the granting of certiorari.

Where the circuit courts have rendered conflicting decisions on issues of considerable moment, especially on matters that should be treated consistently throughout the United States, certiorari should be granted. *See McElroy v. United States*, 455 U.S. 642, 643 (1982); *Marks v. United States*, 430 U.S. 188 (1977); *City of New York v. Saper*, 336 U.S. 328, 329 (1949) (inconsistent application and administration of Bankruptcy Act warranted grant of certiorari). In this controversy, there can be little doubt as to the constitutional significance of the question which is presented. Indeed, in *Granfinanciera, S.A. v. Nordberg*, ____ U.S. ____, 109 S.Ct. 2782 (1989) the Court noted the need for addressing the jury trial issue. The recent pronouncement by the Eighth Circuit further underscores the uncertainty that exists on the question of whether bankruptcy judges can conduct jury trials.

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[1] The Eighth Circuit's decision is reprinted in full in the Appendix beginning at A-38.

The Circuit Court's decision in *United Missouri Bank*, focused on the flaws in the Second Circuit's ruling in the case at bar. The Eighth Circuit addressed the specific issue of whether Congress had either expressly or impliedly empowered the bankruptcy courts to conduct jury trials in the 1984 Bankruptcy Amendments to the Federal Judgeship Act (the "BAFJA"). The court in *United Missouri Bank* held that bankruptcy judges lack authority to conduct jury trials. *Id.* at A-43. In so holding, the Eighth Circuit expressly disapproved and rejected the Second Circuit's decision below in this case.

In its analysis, the Eighth Circuit first noted that the "language of the 1984 Act does not grant jury trial authority." It then turned to the legislative history of the BAFJA for "evidence that Congress intended to grant that authority." It found that no such intention was expressed. *Id.* at A-43-44. The court also rejected the negative inference that some courts have drawn from the language of 28 U.S.C. § 157(b)(5) which specifically directs that personal injury and wrongful death actions be tried by a jury in the district court. Finding the Second Circuit's analysis in this case to be lacking, the Eighth Circuit commented as follows:

> The Second Circuit's conclusion is premised upon the reasoning that since Congress could not deprive a private litigant of his Seventh Amendment right by designating an Article I forum to hear subject matter pertaining to private rights, Congress intended that the Article I forum have the authority to conduct jury trials. We find this to be a faulty syllogism. We think it more plausible that Congress simply intended to transfer all proceedings relating to the bankruptcy estate to the sole jurisdiction of the bankruptcy court without regard to whether a party was entitled to a jury trial, or which forum would conduct the trial.

Id., 1990 WL 48555 at A-45 (footnote omitted). Following *United Missouri Bank* there can be no question that the circuits squarely disagree on the significant constitutional question presented in this case.

Respondent's justification of the Second Circuit's decision below is that it is "the only way to reconcile this Court's holding in *Granfinanciera* with Congress' language expressed in 28 U.S.C. §§ 151 and 157. . ." To conclude that they must be reconciled in the context of a bankruptcy court trial, however, is to assume that when Congress enacted the BAFJA it had the prescience to realize how this Court would later rule in *Granfinanciera*. Quite clearly, that was not the case.

CONCLUSION

The jury trial issue left unresolved in *Granfinanciera*, which has become the focus of numerous subsequent decisions and controversies, will remain in a state of uncertainty without further elaboration from the Court. Certiorari should be granted.

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APPENDIX

IN RE UNITED MISSOURI BANK OF KANSAS CITY, N.A., Petitioner,

89-2981.

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

April 23, 1990

Before LAY, Chief Judge, BOWMAN and BEAM, Circuit. Judges.

LAY, Chief Judge.

*1 The central issue we confront is whether a bankruptcy judge acting under the Bankruptcy Amendments and Federal Judgeship Act 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984 Act), has the statutory and constitutional authority [FN1] to conduct jury trials in a core proceeding in bankruptcy. We hold, contrary to the bankruptcy court [FN2] and the district court, [FN3] that a bankruptcy judge lacks the statutory authority to conduct jury trials in an action alleging a preferential transfer between the debtor and a third party creditor.

BACKGROUND

The bankruptcy trustee for the Kroh Brothers Development Company bankrupt estate brought an adversary action in the bankruptcy court against United Missouri Bank of Kansas City (the Bank), seeking recovery of alleged preferential transfers of approximately $4 million plus interest. The Bank had not previously participated in the bankruptcy proceeding or filed a claim against the Kroh Brothers estate. Following the Supreme Court's decision in Granfinanciera, S.A. v. Nordberg, 109 S. ct. 2782 (1989), which recognized a seventh amendment jury trial right in certain bankruptcy proceedings, the Bank filed a demand for a jury trial, along with a motion in the district court to withdraw the case from the bankruptcy court. [FN4] The bankruptcy judge found the jury trial demand untimely but granted the motion under Fed.R.Civ.P. 39(b), and ruled that the bankruptcy judge had the statutory and constitutional authority to conduct and preside over the jury trial. [FN5] The district

court denied the Bank's motion to withdraw the proceeding, agreeing that the bankruptcy judge could conduct the jury trial. The Bank then filed a Petition for Writs of Mandamus and Prohibition in this court, seeking to restrain the district and bankruptcy courts from allowing the bankruptcy judge to conduct the jury trial in the bankruptcy court.

DISCUSSION

In deciding the issue before us we focus on two recent opinions: the Supreme Court's decision in Granfinanciera, 109 S.Ct. 2782; and the recent decision of the Second Circuit in Ben Cooper, Inc. v. The Insurance Co. of Pennsylvania (In re Ben Cooper, Inc.), No. 89-5026, 1990 Westlaw 11027 (2d Cir., Feb. 7, 1990), which held that a bankruptcy judge has both the statutory and constitutional authority to conduct a jury trial in core proceedings. [FN6] In all due respect to our sister circuit, we must disagree with the Second Circuit's holding that a bankruptcy judge has the statutory authority to conduct jury trials.

A review of the Granfinanciera decision is critical to an understanding of our analysis in this case. In Granfinanciera, the trustee for the Chase & Sanborn bankrupt estate sought to recover alleged fraudulent transfers of approximately $1.7 million plus interest from the defendant, Granfinanciera. The trustee filed the complaint in the district court, which referred the action to the bankruptcy court. The defendant, who had not filed any claims against the bankruptcy estate, demanded a jury trial, which the bankruptcy court denied. Granfinanciera, 109 S.Ct. at 2787.

*2 The Supreme Court found Granfinanciera had a seventh amendment right to a jury trial on the fraudulent transfer claim. The Court found that fraudulent transfer actions were historically brought in courts of law before juries, id. at 2790-94. [FN7] Since, under the 1984 Act, Congress had placed fraudulent transfers within the bankruptcy court's jurisdiction, see 28 U.S.C. § 157(b)(2)(4) (Supp. V. 1987) (bankruptcy court may "hear and determine" fraudulent transfer actions), the Court considered

whether Congress could preempt jury trial rights by assigning a claim to a tribunal that traditionally did not conduct jury trials. "The sole issue before us is whether the Seventh Amendment confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them." 109 S.Ct. at 2795. [FN8] The Court concluded that Congress' ability to block seventh amendment jury trial rights by assigning a claim to an Article I tribunal is limited to those disputes involving "public rights." Since a fraudulent transfer action involves private, common law rights, the Court concluded Granfinanciera was entitled to a jury trial, notwithstanding Congress' placement of the claim in a forum that traditionally did not conduct jury trials. Id. at 2795-2802. Thus, a party to an adversary proceeding in bankruptcy may have a seventh amendment right to a jury trial before some tribunal, and since there has been no claim filed against the Kroh bankruptcy estate, Granfinanciera controls here.

A. Historical Overview

With the Granfinanciera decision as the background, we start our analysis with a historical review of the authority of bankruptcy courts. Article I courts are courts of special jurisdiction created by Congress that cannot be given the plenary powers of Article III courts. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The authority of the Article I court is not only circumscribed by the constitution, but limited as well by the powers given to it by Congress. See Ex parte Bakelite Corp., 279 U.S. 438, 449 (1929); see also Plastiras v. Idell (In Re Sequoia Auto Brokers, Ltd., Inc.), 827 F.2d 1281, 1284 (9th Cir. 1987) ("Congress vests bankruptcy courts with their jurisdiction and their authority has no 'inherent' source"). Although we view this issue in light of the 1984 Act, the historical role of bankruptcy judges illustrates an absence of legislatively authorized power to conduct a jury trial on preferential transfers.

Under the Bankruptcy Act of 1898, see Act of July 1, 1898, ch. 541, 30 Stat. 544, the bankruptcy courts [FN9] were vested

with "summary" jurisdiction over controversies involving property within the actual or constructive possession of the bankruptcy court. Matters falling within a bankruptcy court's summary jurisdiction were equitable matters that did not involve jury trials. See Katchen v. Landy, 382 U.S. 323, 336-37 (1966). Plenary matters, involving disputes over property held by a third person, were heard in the district court, or with the consent of the parties, in the bankruptcy court. See Marathon Pipe Line Co., 458 U.S. at 53. Traditionally, when a claim of preferential transfer was not presented in the bankruptcy proceeding and arose from a plenary action brought by the trustee in federal court the claim was not considered "integral to the restructuring of debtor-creditor relations" and was not deemed to arise "as part of the process of allowance and disallowance of claims." Granfinanciera, 109 S.Ct. at 2799. As Granfinanciera makes clear, bankruptcy courts were statutorily vested with jurisdiction at law as well and could "oversee plenary proceedings." Id. at 2798 (citing Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n, 430 U.S. 442, 454 n.11 (1977)).

*3 Historically, jury trials under the 1898 Act were not held in bankruptcy court, with two narrow statutory exceptions involving involuntary petitions and the dischargeability of debts. See Gibson, Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment, 72 Minn. L. Rev. 967, 972-73 (1988). Until 1973, there was no indication as to which forum was to conduct these jury trials. The bankruptcy rules promulgated by the Judicial Conference in 1973 required jury trials on dischargeability claims to be held in the district court unless a local rule provided otherwise. See Fed. Bank. R. 409(c), reprinted in 12 Collier on Bankruptcy (14th ed.1976). Jury trials involving involuntary petitions were to be conducted by the bankruptcy judge unless trial was demanded before the district court or a local rule required jury trials in the district court. See Fed. Bank. R. 115(b), reprinted in 12 Collier on Bankruptcy (14th ed. 1976). Thus, there was no statutory authority for bankruptcy judges to conduct jury trials under the 1898 Act, and the procedural rules governing the bankruptcy courts did not grant this authority until 1973.

In 1978 Congress overhauled the bankruptcy system and enacted sweeping substantive and procedural changes. See Bankruptcy Reform Act, Pub.L. No. 95-598, 92 Stat. 2549 (1978). The 1978 Act conveyed jurisdiction over all "civil proceedings arising under title 11 or arising in or related to cases under title 11," and placed that authority in the bankruptcy courts. 28 U.S.C. § 1471(b), (c) (1982). Jury trial rights as they existed prior to the 1978 Act were preserved. See 28 U.S.C. § 1480 (1982). Although section 1480 did not expressly provide authority for bankruptcy judges to conduct jury trials, it is apparent from the extremely broad grant of jurisdiction and the legislative history that Congress intended bankruptcy courts exercise that authority. [FN10] The Supreme Court, however, held this broad grant of jurisdiction unconstitutional. Marathon Pipe Line Co., 458 U.S. 50.

Congress responded to the Marathon decision with the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984 Act). [FN11] The 1984 act established a bifurcated method of adjudicating claims in bankruptcy court, and allocating the bankruptcy court's jurisdiction. If a claim is a "core" proceeding, the bankruptcy judge may "hear and determine" the claim and "enter appropriate orders and judgments," subject to review by the district court. See 28 U.S.C. § 157(b)(1). In non-core proceedings, the bankruptcy judge may only "hear" the case, and submit proposed findings of fact and conclusions of law to the district court, which retains the authority to enter a final judgment. See 28 U.S.C. § 158(c)(1). A bankruptcy judge may, with the consent of the parties, "hear and determine" a non-core proceeding, and enter appropriate orders and judgments. 28 U.S.C. § 158(c)(2). The statutory process governing non-core proceedings, i.e., the bankruptcy court submitting proposed findings of fact and conclusions of law to the district court, is in our judgment incompatible with any implication that Congress has provided the bankruptcy court the authority to try jury cases in non-core proceedings. [FN12] Bankruptcy judges now may only "exercise the authority conferred under" the 1984 Act. 28 U.S.C. § 151 (Supp. V 1987). There is no specific grant of authority allowing or prohibiting bankruptcy judges from conducting jury trials, although

jury trial rights are again preserved. See 28 U.S.C. § 1411 (jury trial right with respect to personal injury and wrongful death claims unaffected). Congress, however, vests the bankruptcy judges with their authority, see In Re Sequoia Auto Brokers, Inc., 827 F.2d. at 1284, and as the preceding historical review suggests, jury trial authority in bankruptcy courts has been, at times, contemplated. Therefore, we review the relevant statutes for an indication that Congress expressly granted bankruptcy judges the authority to conduct jury trials, or otherwise intended that they exercise that authority. Our purpose at all times is to determine the intent of Congress. United States v. Jones, 811 F.2d 444, 447 (8th Cir. 1987).

B. Express Authority

*4 The focus of much of the debate over jury trials under the 1984 Act is 28 U.S.C. § 157, which grants bankruptcy courts the authority to take certain actions in certain cases. [FN13] As the Second Circuit acknowledged, the 1984 Act, and in particular section 157, does not contain any specific or express language granting a bankruptcy judge authority to conduct jury trials. See In Re Ben Cooper, No. 89-5026, 1990 Westlaw 11027 at 19. [FN14] The references to jury trials in the 1984 Act address only the authority of the district court. See 28 U.S.C. § 157(b)(5) (1988) (personal injury and wrongful death claims shall be tried in district court). Congress has previously provided express statutory authority to conduct jury trials to a non-Article III tribunal, see 28 U.S.C. § 636(a)(3), (c)(1) (1982) (statutory authority of magistrates to conduct jury trials in certain cases), and thus, we believe, is aware of the language necessary to expressly grant that authority. [FN15] The language of the 1984 Act does not grant jury trial authority.

C. Implied Authority

Since the language of the 1984 Act does not expressly grant jury trial authority, we look to the legislative history for evidence that Congress intended to grant that authority. Blum v. Stenson, 465 U.S. 886, 896 (1984); West v. Bergland, 611 F.2d 710, 723 (8th Cir. 1979), cert. denied, 449 U.S. 821 (1980). The

bankruptcy judge concluded that a "comprehensive reading" of sections 151, 157 and 1411 of title 28 demonstrated Congress' implicit intent to grant jury trial authority. Some courts that have found implied authority for bankruptcy courts to conduct jury trials have relied on the limitations placed on the district court's authority to conduct jury trials. See 28 U.S.C. § 157(b)(5) (personal injury tort and wrongful death actions tried by jury in the district court). This limitation on the forum for these specific actions suggests to some courts that all other jury trials are to be held in the bankruptcy court. See Perino v. Cohen (In Re Cohen), 107 Bankr. 453, 455 (S.D.N.Y. 1989) (statute contemplates that jury trials are to be held in bankruptcy court since only personal injury and wrongful death jury trials are in the district court); Wolfe v. First Federal Savings & Loan Assoc. of Paragould (In Re Wolfe), 68 Bankr. 80, 87-88 (Bankr. N.D. Tex. 1986) (specific limitation in section 157 does not implicitly prohibit bankruptcy court from conducting jury trials); Morse Elec. Co. v. Logicon, Inc. (In Re Morse Elec. Co.), 47 Bankr. 234, 238 (Bankr. N.D. Ind.1985) (bankruptcy court not prohibited from conducting jury trial unless claim involves wrongful death or personal injury).

We reject this argument as contrary to Congress' intent. The legislative history of the 1984 Act, while not particularly illuminating on this issue, does not support this argument. The possibly relevant legislative history reveals only a debate over whether to vest bankruptcy judges with Article III status. See 130 Cong. Rec. H6240-48 (Mar. 21, 1984); 129 Cong. Rec. S9975 (Apr. 27, 1983). There is no discussion in the legislative record that suggests Congress intended to grant bankruptcy judges the authority to conduct jury trials. [FN16]

*5 Granfinanciera, however, requires that a jury trial be provided in this case. We recognize that although the authority to conduct jury trials is not expressly provided, that authority may still be implied if it is incidental and necessary to make the legislation effective. 2A Sutherland Stat. Const. § 55.04 (1984); see also Phelps Dodge Corp. v. National Labor Relations Bd., 313 U.S. 177 (1941); United States v. Sischo, 262 U.S. 165 (1923). In In Re Ben Cooper, No. 89-5026, the Second Circuit resolved

the statutory authority issue with succinct analysis. It found that the adversary proceeding was a core proceeding for which Granfinanciera required a jury trial and that the authority of bankruptcy judges to conduct jury trials must be implied to reconcile the congressional intent evident in the power granted in the 1984 Act. The Second Circuit reasoned:

> Despite the lack of a specific statutory provision, we nevertheless hold that the bankruptcy courts may conduct jury trials in core proceedings. This is the position taken by the majority of courts which have considered the issue. * * * Our holding rests on two separate but related provisions. The first provision is 28 U.S.C. § 151 (1988) [bankruptcy judge may exercise authority conferred under chapter]. The second provision is § 157(b) which, as stated previously, gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. Granfinanciera teaches that such proceedings, if legal in nature, are subject to the Seventh Amendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders. Construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns.
>
> In Re Ben Cooper, No. 89-5026, 1990 Westlaw 12027 at 19-20. (citations omitted). [FN17]

The Second Circuit's conclusion is premised upon the reasoning that since Congress could not deprive a private litigant of his Seventh Amendment right by designating an Article I forum to hear subject matter pertaining to private rights, Congress intended that the Article I forum have the authority to conduct jury trials. We find this to be a faulty syllogism. We think it more plausible that Congress simply intended to transfer all proceedings relating to the bankruptcy estate to the sole jurisdiction of the bankruptcy court [FN18] without regard to whether a party was entitled to a jury trial, or which forum would conduct the trial. In fact, it appears Congress did not even consider the need to provide jury trial authority. As the Supreme Court pointed out: "Thus, the 1984 Amendments' denial of the right to a jury trial in preference and fraudulent conveyance

actions can hardly be said to represent Congress' considered judgment of the constitutionality of this change." Granfinanciera, 109 S.Ct. at 2800 n.16. If Congress did not consider the constitutionality of denying jury trials, we doubt if it considered the need to provide for authority for the bankruptcy court to conduct a jury trial.

*6 It is not enough that the implied power is consistent with the legislation from which it is implied. "The power to be implied * * * must be practically indispensable and essential in order to execute the power actually conferred." 2A Sutherland Stat. Const. § 55.03 However, the power to conduct jury trials is not indispensable to bankruptcy judges' ability to execute the authority conferred by the 1984 Act. Bankruptcy judges are vested with fairly broad power to "hear and determine" and "enter appropriate orders and judgments" in core proceedings, but we do not believe this broad grant of authority contemplates that the authority to conduct jury trials is an indispensable power necessary to carry out the authority actually conferred by this section. We note that Congress, at the time of the 1984 Act, was extremely wary of its authority to clothe article I courts with article III powers. See Statement of Sen. Hatch, H.R. Rep. No. 5174, 98th Cong., 2d Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 590, 594. Cf. Griffith v. Oles (In Re Hipp, Inc.), 895 F.2d 1,503, 1518 (5th Cir. 1990) (since Congress intended to limit bankruptcy courts power and jurisdiction under the 1984 Act, court would not imply criminal contempt power where that power was not expressly granted).

We hesitate to reach too far to imply the authority for an article I court to try jury cases involving private rights simply because Congress seeks to introduce a more efficient bankruptcy scheme, see Granfinanciera, 109 S.Ct. at 2801 n.17, especially where congressional and historical support for that authority is lacking. We are likewise guided by the principle that we should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative poses no constitutional question." Gomez v. United States, 109 S.Ct. 2237, 2241 (1989). Given the absence of supporting legislative history, and the serious constitutional problems posed by an alternative

interpretation, our interpretation is not only reasonable, but necessary. See, e.g., In Re Hiny, Inc., 895 F.2d at 1509 (where constitutionality of bankruptcy courts exercising criminal contempt authority was questionable, court would construe 1984 Act as not conferring that authority).

We find no statutory authorization afforded bankruptcy judges or courts to conduct jury trials on legal proceedings. Consequently, we do not reach the constitutional issues.

CONCLUSION

The writ of mandamus requiring the district court to withdraw this action from the bankruptcy court pursuant to 28 U.S.C. § 157(d) is hereby granted. The judgment of the district court is vacated. The case is remanded for trial by the district court.

Footnotes

FN1. Although we recognize the grave constitutional problems posed by the issue in this case, we reach only the statutory issue.

FN2. The Honorable Karen See, United States Bankruptcy Judge for the Western District of Missouri.

FN3. The Honorable Howard Sachs, United States District Judge for the Western District of Missouri.

FN4. See 28 U.S.C. § 157(d) (Supp. V. 1987): "The district court may withdraw, in whole or in part, any case or proceeding referred [to the bankruptcy court] under this section, on its own motion or on timely motion of any party, for cause shown."

FN5. We agree with the bankruptcy judge that the Bank has a constitutional right to a jury trial under Granfinanciera. We also find the bankruptcy judge did not abuse her discretion in granting the jury trial motion under Fed.R.Civ.P. 39(b). Cf. Littlefield v. Fort Dodge Messenger, 614 F.2d 581, 585 (8th Cir. 1980) (no abuse of discretion in denying belated request for jury trial).

FN6. The Second Circuit had to decide whether a state law insurance contract claim was a core proceeding and whether the defendant was entitled to a jury trial on its adversary claim under the reasoning of Granfinanciera. After deciding these issues affirmatively, the court then determined that the bankruptcy court had the statutory authority to conduct a jury trial, and that there was no constitutional violation in the delegation by Congeress of jury trial authority to an article I court. In Re Ben Cooper, No. 89-5026.

FN7. The court reached this result by relying in part on the law of preferential transfers, thus suggesting the same result applies to this claim of preferential transfers. See Granfinanciera, 109 S.Ct. at 2790-91 ("There is no dispute that actions to recover preferential or fraudulent transfers were often brought at law in late 18th century England.")

FN8. It is important to distinguish between the issue decided in Granfinanciera and the issue this court decides. The Supreme Court decided the right to a jury trial without deciding which judge, the district court judge or the bankruptcy judge would conduct the trial. In this case, however, we consider only the issue of which judge shall preside at the jury trial.

FN9. The federal district courts were the designated "bankruptcy courts" under the 1898 Act, but the duties of the bankruptcy court were carried out by "bankruptcy referees" (later called "judges"), appointed by the district court. See Act of July 7, 1898, ch. 541, §§ 1(8), 34, 30 Stat. 544, 555.

FN10. See 28 U.S.C. § 1471(c) (bankruptcy courts shall exercise all jurisdiction granted by the 1978 Act); see also H.R. Rep. No. 595, 95th Cong., 1st Sess. 448 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News 5963, 5973 ("Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits,' that is, suits that are brought in State or Federal courts other than bankruptcy courts.") id. at 6400 (the broad grant of jurisdiction to bankruptcy courts allows trial in bankruptcy court of actions that were previously tried in federal or state court). The Supreme Court interpreted

section 1480 as providing the bankruptcy court with authority to conduct jury trials. See Marathon Pipeline Co., 458 U.S. at 55.

FN11. With the enactment of the 1984 Act, 28 U.S.C. § 1480 was repealed. Some courts continued to find jury trial authority by relying in part on Bankruptcy Rule 9015, which was promulgated in 1983, after the Marathon decision. See Gibson, supra, at 988. Rule 9015 prescribed the procedures for jury trials. However, since it was a procedural rule, and could not create substantive rights, Rule 9015 was abrogated in 1987 to eliminate any confusion about its relevance to jury trials in bankruptcy courts. See 9 Collier on Bankruptcy at 9015-1 (15th ed.) (citing Advisory Committee Note on abrogation of Rule 9015).

FN12. See Haden v. Edwards (In Re Edwards), 104 Bankr. 890, 898 (Bankr. E. D. Tenn.1989). Some bankruptcy courts however, have reconciled this language as not being inconsistent with the bankruptcy court's authority to try jury cases in non-core proceedings. See, e.g., Perino v. Cohen (In Re Cohen), 107 Bankr. 453, 455 (S.D.N.Y. 1989) (bankruptcy courts exercise judicial authority in core and non-core proceedings); see also Gibson, supra at 1029-30 (courts concluding authority to conduct jury trials exists but declining to exercise that authority absent consent). We need not discuss this problem, since for purposes of the present case Congress has clearly delineated the issue of preferential transfers to be a core proceeding. 28 § 157(b)(2)(F). We thus view the issue of the bankruptcy court's authority to try jury cases in terms of its jurisdiction granted to "hear and determine" core proceedings.

In taking this view, we make no attempt to decide whether Congress may or may not properly define a preferential transfer dispute such as we have here a "core proceeding." See, e.g., Granfinanciera, 109 S.Ct. at 2800 and n.16.

FN13. This statute provides:

> (b)(1)Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred (by the district court) and may enter appropriate

> orders and judgments, subject to review under section 158 of this title. * * * (5) The district court shall order that personal or tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.
>
> (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

28 U.S.C. § 157(b), (c) (emphasis added). Appeals from the orders and judgments of the bankruptcy judge are governed by 28 U.S.C. § 158.

FN14. This fact alone has caused many bankruptcy judges to find that they lacked the statutory authority to conduct jury trials. See, e.g., Hughes-Bechtol, Inc. v. Air Enter., Inc. (In Re Hughes Bechtol, Inc.), 107 Bankr. 552, 571 (Bankr. S.D. Ohio 1989); Howison v. Country Hills Assoc. (In Re W.G.M.C., Inc.), 96 Bankr. 5, 7 (Bankr. D. Me.1989); Weeks v. Kramer, (In Re G. Weeks Sec. Inc.), 89 Bankr. 697, 714 (Bankr. W.D. Tenn. 1988).

FN15. We reject the trustee's argument that the "hear and determine" language of 28 U.S.C. § 157(b)(1) is an explicit grant of authority to conduct jury trials. We find persuasive the reasoning of the court in In Re G. Weeks Sec., Inc., 89 Bankr. at 714: "Congress could easily have expressed its intention that the bankruptcy courts were authorized to conduct [jury] trials. The absence of that positive expression and the presence of statutory language to the contrary * * * makes it clear that Congress did not authorize jury trials in the bankruptcy courts."

FN16. The one statement in the legislative history that arguably supports jury trial authority is, at the same time, too vague and ambiguous to do so. In discussing the powers of bankruptcy judges, Representative Kindness stated: "The bankruptcy judge will conduct the trial, make a recommendation to the district court[.]" 130 Cong. Rec. H6242 (Mar. 21, 1984). This statement was made during the debate over Article III status for bankruptcy judges. Representative Kindness also pointed out that his amendment, to create non-Article III bankruptcy judges which was eventually adopted, was "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operating. * * * [The amendment] add[s] the endorsement of the Congress to the emergency rule, the model rule under which the court has been operating[.]" Id. The Emergency Rules were adopted by the Judicial Conference in response to the Marathon Pipeline Co. decision, to provide operating rules for the bankruptcy courts until Congress enacted a new system. The Emergency Rules prohibited bankruptcy judges from conducting jury trials. See Emergency Rule (d)(1)(D), reprinted in 1 Collier on Bankruptcy, § 3.01(1)(b)(vi) (15th ed. 1989). Thus, if anything can be gleaned from this commentary, it is that Congress intended to continue the Emergency Rule's prohibition against bankruptcy judges conducting jury trials.

FN17. We question the Second Circuit's implicit suggestion that the Supreme Court's Granfinanciera opinion contemplated jury trials in the bankruptcy court. See In Re Ben Cooper, No.

89-5026, 1990 Westlaw 11027 at 16 (Granfinanciera court contemplated that its holding would result in jury trials in bankruptcy courts). The Supreme Court, despite Justice White's persuasive challenge, see 109 S.Ct. at 2810-11 (White, J., dissenting), did not even implicitly sanction the authority of the bankruptcy judge to conduct jury trials, leaving that issue open as unnecessary to its decision. Granfinanciera, 109 S.Ct. at 2794-95.

FN18. Justice White argues that Congress not only did just that but had a constitutional right to do so:

> With the historical evidence thus in equipoise—and with the nature of the relief sought here not dispositive either, * * * —we should not hesitate to defer to Congress' exercise of its power under the express constitutional grant found in Art. I, § 8, cl. 4, authorizing Congress "[t]o establish . . . uniform Laws on the subject of Bankruptcies." Congress has exercised that power, defining actions such as the one before us to be among the "core" of bankruptcy proceedings, triable in a bankruptcy court before a bankruptcy judge and without a jury. I would defer to these decisions.

Id. at 2814 (White, J., dissenting) (emphasis added).

No. 89-1784

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA and
KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 8, 1990
CERTIORARI GRANTED JUNE 28, 1990

BEST AVAILABLE COPY

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GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DATE	FILINGS — PROCEEDINGS 89-5026
7-27-89	Copy of district court docket entries and notice of appeal on behalf of Appellant BEN COOPER INC., Filed.
7-27-89	Appellants BEN COOPER INC, Form C Filed. (W/pfs and COPY OF D.C. ORDER) (RECEIVED ON 7-19-89)
7-27-89	Appellants BEN COOPER INC, Form D, Filed. (RECEIVED ON 7-19-89)
8-1-89	Copy of receipt re: payment of docketing fee in district court, Filed.
8-10-89	SCHEDULING ORDER #1, FILED.
8-30-89	Record on appeal filed (original papers of the district court)
9-11-89	Appellants BEN COOPER, INC., --- brief filed (w/pfs)
9-11-89	Appellants BEN COOPER, INC., --- joint appendix filed (w/pfs).
10-10-89	Appellees KERWICK & CURRAN, INC., AND KALVIN-MILLER INTERNATIONAL, INC brief filed w/pfs
10-10-89	Appellee THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA brief filed w/pfs
10-24-89	Appellant Ben Cooper, Inc. reply brief filed w/pfs.
11-27-89	Appellant Ben Cooper Inc motion for adjournment of oral argument filed (all to cal. 11/27)
11/29/89	Order DENIED Appellant BEN COOPER INC motion for adjournment of oral argument FILED.
12-21-89	Case heard before TIMBERS, CARDAMONE, PRATT, C.JJ. (tape #99)
2/7/90	Judgment reversed and remanded by Published Signed Opinion field (WHT)
2/7/90	Judgment filed
	Mandate Issued (judgment and opinion)

CIVIL DOCKET
SOUTHERN DISTRICT OF NEW YORK

DATE	NR.	PROCEEDINGS
5-26-89	89	BEN COOPER, INC. v. THE INS. CO. OF THE STATE OF PENN., et al.: Fld. Memo of Law in support of the motion of deft. The Ins. Co. of the state of Penn. for relief from the May 24, 1989 Bankruptcy Court Order.
6/2/89	90	BEN COOPER, INC. v. THE INS. CO. OF THE STATE OF PENN., et al.: Fld. Notice of Cross-Motion for an order withdrawing the reference of the adversary proceeding commenced by debtor Ben Cooper, Inc.
6/2/89	91	BEN COOPER, INC. v. THE INS. CO. OF THE STATE OF PENN., et al.; Fld. Memo of Law in opposition to motion of deft. The Ins. Co. of the State of Penn. for relief from the order of the Bankruptcy Court.
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DATE	NR.	PROCEEDINGS
6/30/89	101	IN RE: BEN COOPER, INC. Fld. O.T.S.C. with a Stay . . . it is ordered that Ben Cooper, Inc., show cause on July 11, 1989 why an order should not be entered stay in whole or in part the orders of the Bankruptcy Court. . . . LEISURE, J.
6-30-89	102	IN RE: BEN COOPER, et al: Fld notice of cross motion; take notice that the undersigned will cross-move this Court on behalf of deft Kerwick & Curran on 7-11-89 at 10:00 am . . . for an order granting leave to appeal.
6-30-89	103	IN RE: BEN COOPER, et al: Fld memo in support of doc#102. JL
7-11-89	----	IN RE: BEN COOPER, et al: Fld memo-end on doc #101; after hearing the parties this application is granted as stated upon the record in open Court today. STANTON J Dtd 7-11-89. JL
7-11-89	----	IN RE: BEN COOPER, et al: Fld memo-end on doc #102; granted as indicated upon the record in open Court this morning after hearing. STANTON J Dtd 7-11-89. JL
7/21/89	104	IN RE: BEN COOPER, INC.: Fld. Transcript of Proceedings before J. Walker, dated 5/31/89.
7-18-89	106	IN RE: BEN COOPER: Fld notice of appeal: Notice is given that Plntff Ben Cooper hereby appeals to the U.S. Court of Appeals . . . from the order entered 7-11-89. JL
7-7-89	107	IN RE: BEN COOPER, INC: Fld memo in reply to Debtor's opposition to the motion. JL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos,:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Adv. Pro.
No. 89-5685A

ORDER TO
SHOW CAUSE

Upon the annexed affidavit of Philip C. Silverberg, sworn to on June 22, 1989 and the exhibits annexed thereto, and the memorandum of law in support of the June 22, 1989 motion of defendant The Insurance Company of The State of Pennsylvania ("ICSP"), it is hereby:

ORDERED that Ben Cooper, Inc., Light Manufacturing Co., Inc., Aimwell Products, Inc. and Ben Cooper Sales Corp., debtors-in-possession ("Debtor"), show cause before this Court at the Courthouse, located at 40 Centre Street, Room 312, New York, New York, on the 11th day of July, 1989 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can

be heard, why an order should not be entered: 1) staying in whole or in part the May 24, 1989 and June 15, 1989 orders of the Bankruptcy court; 2) granting ICSP leave to appeal pursuant to 28 U.S.C. §158(a) from those orders; 3) reversing the Bankruptcy Court's determination that this adversary proceeding is core pursuant to 28 U.S.C. §157(b)(2)(A) and (L); 4) establishing ICSP's right to a jury trial in the adjudication of this controversy; 5) withdrawing reference of the adversary proceeding commenced by Debtor against defendants from the Bankruptcy Court pursuant to 28 U.S.C. §157(d), thereby vacating the orders issued by the Bankruptcy Court below; 6) determining that this Court abstains pursuant to 28 U.S.C. §1334(c) from hearing the adversary proceeding; 7) dissolving the preliminary injunction imposed by the Bankruptcy Court's May 24 and June 15, 1989 orders; and for such other relief as may be just and proper; and it is further

ORDERED that a hearing be held on the return date of this motion to deterimne the issues raised herein; and it is further

ORDERED that service of this order to show cause together with a copy of the papers annexed hereto on counsel for the Debtor and co-defendants Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. on or before June 23, 1989 at 3:00 P.M. shall be deemed sufficient service.

Issued at 11:00 a.m. on June 23, 1989.

ENTER,

/s/

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Adv. Pro.
No. 89-5685A

AFFIDAVIT

PHILIP C. SILVERBERG, being duly sworn, deposes and says:

1. I am associated with the firm of Mound, Cotton & Wollan, attorneys for defendant The Insurance Company of The State of Pennsylvania ("ICSP"). This affidavit and the accompanying memorandum of law are submitted in support of ICSP's motion, brought by order to show cause, for an order staying the May 24, 1989 order, as modified by the June 15, 1989 order, of the Bankruptcy Court (Hon. Cornelius Blackshear) (the "Orders"), which are annexed hereto as Exhibits 1 and 2.

2. ICSP's motion seeks an order granting it the following relief: 1) a stay in whole or in part of the May 24 and June 15, 1989 orders; 2) permission pursuant to 28 U.S.C. §158(a), to appeal from so much of the Orders as may be determined to be non-final and non-appealable as of right; 3) reversal of Judge Blackshear's determination that this adversary proceeding is core pursuant to 28 U.S.C. §157(b) (2)(A) and (L); 4) a determination that ICSP is entitled to a jury trial in the adjudication of this adversary proceeding; 5) withdrawal of the reference of the adversary proceeding brought by Ber. Cooper, Inc. ("Debtor") in the Bankruptcy Court from that Court pursuant to 28 U.S.C. §157(d), thereby vacating the orders issued by the Bankruptcy Court below; 6) abstention of this Court, pursuant to 28 U.S.C. §1334(c), from hearing the adversary proceeding; 7) dissolution of the preliminary injunction imposed against ICSP by the Bankruptcy Court; and for such other relief as may be just and proper.

3. The salient facts and circumstances leading to this motion are as follows.

4. The Debtor filed a petition for Chapter 11 bankruptcy in April, 1988.

5. Some time after, Mr. Michael J. Sherman was appointed chief executive officer of Ben Cooper, Inc. to run the company as Debtor-in-Possession under Chapter 11 reorganization. According to Mr. Sherman's affidavits, sworn to on May 8 and May 17, 1989, Mr. Sherman retained two insurance brokers, co-defendants, Kalvin-Miller International, Inc. ("Kalvin") and Kerwick & Curran, Inc. ("Kerwick") to procure several insurance policies for the Debtor covering different risks. A copy of Mr. Sherman's two affidavits appear as part of Debtor's moving papers in the Bankruptcy Court and are annexed hereto without their exhibits as Exhibit 3. Those brokers procured from ICSP a standard commercial property coverage and general liability insurance policy (the "Policy"). A copy of the Policy is annexed hereto as Exhibit 4.

6. Mr. Sherman noted in his May 8, 1989 affidavit that during the procurement process the brokers made material

misstatements of fact and omitted key information when submitting the risk to the insurers, including ICSP. Mr. Sherman noted major omissions from the description of certain aspects of the Debtor's business. (See, Sherman May 8 affidavit at 4-5.) These misrepresentations and omissions are at the heart of the dispute between the Debtor and ICSP because ICSP believes that the Policy is thereby void from inception.

7. On January 6, 1989, there was a small fire at the Debtor's Rossville, Georgia warehouse facility.

8. On or about January 9, 1989, ICSP and the Debtor entered into a non-waiver agreement by which the Debtor agreed, among other things, that ICSP was not waiving any of its rights, including the right to disclaim coverage or otherwise deny the claim by investigating the loss. A copy of the non-waiver agreement is annexed as Exhibit 5.

9. By letter dated January 25, 1989, annexed as Exhibit 6, this firm, as the representative of ICSP, reserved ICSP's rights and requested that the Debtor submit to an examination under oath as part of ICSP's investigation into the circumstances of the alleged loss.

10. Mr. Sherman submitted to examination under oath on March 1, 1989. Even though the ICSP investigation did not conclude that day, the Debtor was aware of ICSP's concerns regarding the coverage and the loss. Moreover, as is evident from the examination transcript, the Debtor agreed to provide additional information concerning the loss, documents regarding coverage, and any further documents concerning the procurement of the Policy. Salient portions of that examination under oath transcript are annexed as Exhibit 7.

11. By letter dated April 13, 1989, the Debtor's public adjuster submitted a damage and business interruption claim of over $2,000,000 as well as supporting documents. Annexed as Exhibit 8 is a copy of that letter without its attachment.

12. On or about April 18, 1989, ICSP commenced an action in the Supreme Court of the State of New York seeking a

declaration that the Policy is void from inception and a declaration that it is not liable for any loss sustained by the Debtor relating to the January 6, 1989 fire at the Debtor's Georgia location. In substance, the suit alleges that the Debtor, through its authorized insurance brokers, made certain representations and submitted certain information to ICSP in connection with the Debtor's request for property insurance for certain specific locations: that the information was false and misleading in that it omitted, *inter alia*, that the Debtor manufactured Halloween costumes and accessories, and further, that the information submitted did not accurately describe the building structures at the locations nor the operations therein conducted. It also appears that there has been exaggeration by the Debtor of the extent and value of the damage caused by the loss, which would give ICSP an independent basis to deny liability. A copy of the ICSP summons and complaint is annexed as Exhibit 9.

13. On April 18, 1989, ICSP mailed a notice of cancellation to the Debtor to cancel the Policy effective June 20, 1989, thereby exercising its right to cancel under the Policy. A copy of the cancellation notice is annexed as Exhibit 10.

14. On May 9, 1989, the Debtor filed an order to show cause and moved for a temporary restraining order in the Bankruptcy Court of the Southern District of New York. The Debtor also moved to commence its own action in Bankruptcy Court against ICSP as well as the two brokers involved.

15. On May 9, 1989, Judge Blackshear entered a temporary restraining order against ICSP staying its state court action, enjoining ICSP from cancelling the insurance Policy, and ordering expedited discovery in the action commenced by the Debtor in the Bankruptcy Court. A copy of the May 9 order is annexed as Exhibit 11.

16. On May 16, 1989, ICSP served its memorandum of law in opposition to the Debtor's motion for a temporary restraining order.

17. On May 17, 1989, oral argument was heard before Judge Blackshear. The Court, in a bench ruling, granted Debtor's

request for a preliminary injunction, directed accelerated discovery, and made other rulings. A copy of the transcript of the May 17 argument is annexed as Exhibit 12.

19. Upon notice to counsel for all parties, ICSP made a motion for relief from the May 24 order by Order to Show Cause on May 26, 1989 to the United States District Court for the Southern District of New York.

20. Defendant Kerwick & Curran joined ICSP's motion to the District Court by Cross-Motion for Withdrawal of the Reference with supporting memorandum on May 30, 1989.

21. On May 31, 1989 the Honorable John M. Walker, U.S.D.J., heard oral argument on ICSP's motion to the District Court. A copy of the transcript of the May 31 hearing is hereto annexed as Exhibit 13. Judge Walker declined to reach any of ICSP's requests for relief until the Bankruptcy Court determined one threshold issue, namely whether this adversary proceeding is core or non-core pursuant to 28 U.S.C. §157(b).

22. Judge Walker stayed all discovery requests under the May 24 order pending the Bankruptcy Court's specific determination on the core versus non-core issue. Judge Walker directed Judge Blackshear to make a determination and stated that ICSP's right to pursue its appeal in the District Court for relief from the Bankruptcy Court would remain inviolate. (Transcript, May 31, 1989 Hearing at 19.)

23. Counsel then submitted further papers to the Bankruptcy Court. Counsel for Kerwick & Curran submitted a brief in support of a motion for finding the action non-core on June 6, 1989. Counsel for Ben Cooper, Inc. submitted two letters on June 13 and June 14, 1989. ICSP submitted a Supplemental Brief on June 14, 1989.

24. On June 15, 1989, the Honorable Cornelius Blackshear, U.S.B.J., heard oral argument from counsel for all parties. A copy of the transcript of the June 15 hearing is hereto annexed as Exhibit 14. Judge Blackshear rendered an opinion from the

bench finding that this adversary proceeding is core pursuant to 28 U.S.C. §§157(b)(2)(A) and (L). Judge Blackshear also ordered discovery calling for production of certain documents on June 20, 1989, and for depositions to be taken on June 28, July 10, July 13, and July 18, 1989 of ICSP, Kalvin-Miller, Kerwick & Curran, and Ben Cooper, Inc., respectively. (See Exhibit 2, June 15 order modifying May 24 order.)

25. We have been advised by Judge Walker's chambers that this motion is to be referred to the Part I judge sitting at the time ICSP's motion is made.

26. For the reasons set forth in the accompanying memorandum of law, this Court should grant ICSP the relief requested and stay the Bankruptcy Court's Orders until such time as this Court can review the issues raised in ICSP's present motion.

/s/Philip C. Silverberg
Philip C. Silverberg

Sworn to before me this
22nd day of June, 1989

/s/Irene Siegel
Notary Public

IRENE SIEGEL
Notary Public, State of New York
No. 41-4872330
Qualified in Queens County
Commission Expires October 14, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

COUNTER-
ORDER FOR
PRELIMINARY
INJUNCTION

Ben Cooper, Inc. ("Debtor") having moved the Court for a temporary restraining order and preliminary injunction enjoining the defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them, pending the final hearing and determination of the adversary proceeding No. 89-5685A (the "Adversary Proceeding"): (i) from prosecuting the action commenced on or about April 18, 1989 in the Supreme Court of the State of New York, County of New York, entitled *The Insurance Company of the State of Pennsylvania v. Ben Cooper, Inc.* (ICSP) (the "State Court Action"); (ii) from terminating the Debtor's insurance policy issued

effective October 1, 1988 with defendant The Insurance Company of the State of Pennsylvania (a copy of which is annexed as Exhibit A to the complaint in the Adversary Proceeding and as Exhibit C to the affidavit of Michael J. Sherman, sworn to May 9, 1989), – including the provision of coverage for the manufacturing facilities and locations of the Debtor and its affiliate; and (iii) directing expedited discovery of the defendants; and

The Court, on May 9, 1989, having entered, on good and sufficient notice to defendants, the Order to Show Cause and Temporary Restraining Order; and a hearing on the Debtor's motion for a preliminary injunction having been held on May 17, 1989; and the Court having heard and considered the arguments of Lowenthal, Landau, Fischer & Ziegler, P.C. (Lawrence L. Ginsburg, Esq., of counsel) for the Debtor and Mound, Cotton & Wollan (Costantino P. Suriano, Esq., of counsel) for defendant The Insurance Company of the State of Pennsylvania, Jackson & Nash (Victoria A. Stewart, Esq., of counsel) for defendant Kalvin-Miller International, Inc. and Ohrenstein and Brown (Michael Brown, Esq., of counsel) for defendant Kerwick & Curran, Inc.; and upon the Order to Show Cause and Temporary Restraining Order, entered May 9, 1989, the Affidavit of Michael J. Sherman, sworn to May 9 , 1989 (with the exhibits annexed thereto), the Reply Affidavit of Michael J. Sherman, sworn to May 17, 1989, the Complaint in the Adversary Proceeding, Debtor's Memorandum of Law and Debtor's Reply Memorandum of Law, all in support of the Debtor's motion, and the Memorandum of Law of defendant The Insurance Company of the State of Pennsylvania, in opposition to the Debtor's motion; and

It appearing to this Court that defendants are about to commit the acts hereinafter specified and that they will do so unless restrained by further order of this Court pending a determination of the Adversary Proceeding, and that immediate and irreparable injury, loss or damage will result to the Debtor and its creditors in that the prosecution of the State Court Action and any attempt to void the Debtor's insurance policy will violate the Plan of Reorganization and make it impossible for the Debtor

to pay its creditors in accordance with its Plan of Reorganization, confirmed by this Court on April 4, 1989, and that it is appropriate to deny the request of ICSP for a stay of this Court's decision pending any appeal to the District and that the State Court Action violates the Order of Confirmation, it is

ORDERED, that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are enjoined pending a determination in the Adversary Proceeding from proceeding with the State Court Action and from terminating the Debtor's insurance policy (copies of which are annexed as Exhibit A to the Complaint in the Adversary Proceeding and as Exhibit C to the affidavit of Michael J. Sherman, sworn to May 9, 1989) – including the provision of full coverage for the manufacturing operations and locations of the Debtor and its affiliate; and it is further

ORDERED, that pursuant to Rule 7030 of the Bankruptcy Rules, all parties shall take the depositions upon oral examination of the defendants, at the offices of the Debtor's attorneys, (pursuant to the deposition notice annexed as Exhibit I to the Affidavit of Michael J. Sherman, sworn to May 9, 1989) as follows:

1. May 31, 1989 at 10:00 a.m.: The Insurance Company of the State of Pennsylvania;

2. June 2, 1989 at 10:00 a.m.: Kalvin-Miller International, Inc. by Mark Derrenberger; and

3. June 7, 1989 at 10:00 a.m.: Kerwick & Curran, Inc. by Lester Edelman; and it is further

ORDERED, that the deposition of Ben Cooper, Inc. shall be taken by the defendants on June 8, 1989, and it is further

ORDERED, that on or before May 26, 1989, Debtor and defendants shall attempt, with all due diligence, to produce all documents requested pursuant to the document demands served by all parties.

Issued at 12:40 p.m., May 24, 1989.

/s/Cornelius Blackshear

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

NOTICE OF
SETTLEMENT

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an Order for Preliminary Injunction which shall be submitted for settlement before the Hon. Cornelius Blackshear, United States Bankruptcy Judge, at the United States Bankruptcy Court, Room 610—20, United States Custom House, 1 Bowling Green, New York, New York, on May 22, 1989.

Dated: New York, New York
May 22, 1989

Yours, etc.,

JACKSON & NASH

By: /s/Victoria A. Stewart
Victoria A. Stewart
Attorney for Kalvin-Miller
International, Inc.
330 Madison Avenue
New York, New York 10017
(212) 370-8100

TO: MOUND, COTTON & WOLLAN
Attorneys for Insurance Company
of the State of Pennsylvania
125 Maiden Lane
New York, New York 10038

LOWENTHAL, LANDAU, FISCHER
& ZIEGLER, P.C.
250 Park Avenue
New York, New York 10177

OHRENSTEIN & BROWN
Attorneys for Kerwick & Curran, Inc.
655 Third Avenue
New York, New York 10017

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

Adv. Pro.
89-5685A

ORDER

Upon the Counterorder for Preliminary Injunction entered by this Court on May 24, 1989 (the "Order"); and the affidavits and memoranda and arguments referred to in the Order, it is

ORDERED, that, by the Order Confirming Amended Consolidated Plan of Reorganization dated April 4, 1989, this Court expressly retained jurisdiction over the claims set forth in the Adversary Proceeding, and it is further

ORDERED, that the Adversary Proceeding is a core proceeding as defined under 28 U.S.C. §157(b)(2) and it is further

ORDERED, that the Order is modified to the extent that, pursuant to Rule 7030 of the Bankruptcy Rules, all parties shall take the depositions upon oral examination of the defendants, at the offices of the Debtor's attorneys, pursuant to the deposition notice (the "Debtor's Notice") annexed as Exhibit I to the affidavit of Michael J. Sherman, sworn to May 9, 1989, as follows:

1. June 28, 1989 at 10:00 a.m.: the Insurance Company of the State of Pennsylvania;

2. July 10, 1989 at 10:00 a.m.: Kalvin-Miller International, Inc., by Mark Derrenberger; and

3. July 13, 1989 at 10:00 a.m.: Kerwick & Curran, Inc. by Lester Edelman; and it is further

4. July 18, 1989 at 10:00 a.m.: The debtor by Michael Sherman

ORDERED, that the Order is modified to the extent that the deposition of Ben Cooper, Inc. shall be taken by the defendants on June 26, 1989, and it is further

ORDERED, that the Order is modified to the extent that on or before June 20, 1989, Debtor and defendants shall attempt, with all due diligence, to produce all documents requested pursuant to the document demands served by all parties except as to demand 2 of the Debtors' Notice pursuant to which defendants shall, with all due diligence, identify the writings referred to therein and shall produce those documents obtained.

Issued at 11:35 a.m., June 15, 1989.

/s/Cornelius Blackshear

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

Assigned to
Hon. Cornelius
Blackshear

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

AFFIDAVIT IN SUPPORT OF DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Michael J. Sherman, being duly sworn, deposes and says:

1. I am the chief executive officer of Ben Cooper, Inc. (the "Debtor"), having initially been appointed to that position by this Court. I make this affidavit on behalf of the Debtor seeking this Court's intervention to prevent The Insurance Company of the State of Pennsylvania (the Insurance Company) from taking certain actions which threaten the consummation of the

confirmed Plan of Reorganization (providing for 100% payment to all creditors) which was so carefully nurtured in these proceedings.

2. Specifically, I respectfully request this Court to enter a temporary restraining order and, thereafter, a preliminary injunction — pending a determination of the adversary proceeding to be commenced herein:

a. directing the Insurance Company to provide coverage to the Debtor (including coverage for its manufacturing facilities) in accordance with the insurance policy hereinafter described;

b. staying the prosecution of the action (the "State Court Action") commenced by the Insurance Company against the Debtor on April 18, 1989 in the Supreme Court of the State of New York, County of New York;

c. retaining jurisdiction over the adversary proceeding and determining expeditiously the dispute/claim which arose between the Debtor and the Insurance Company (and the other defendants) prior to the entry of the Order of Confirmation on April 4, 1989;

d. directing expedited discovery of the Insurance Company and the other defendants in the adversary proceeding; and

e. determining that the actions of the Insurance Company threaten the consummation of the Plan of Reorganization and violate the Order of Confirmation.

BACKGROUND

3. Immediately upon my installation as chief executive officer of the Debtor, I set about to review the Debtor's insurance

coverage then in effect. To accomplish this analysis, I turned to Lester Edelman ("Edelman") of Kerwick & Curran, Inc., Hauppauge, New York. I clearly recall explaining to Edelman in or about April, 1988 that the Debtor was the "largest manufacturer" of halloween costumes and paraphernalia in the United States. After discussing this undertaking, Edelman referred me to Mark Derrenberger ("Derrenberger") of Kalvin-Miller International, Inc. ("Kalvin-Miller"), of New York, New York.

4. Derrenberger and Kalvin-Miller immediately set about to fully review the Debtor's insurance coverage and insurance needs. In or about July 1988 – at the recommendation of Kerwick & Curran, Inc., I appointed Kalvin-Miller "broker of record" on all of the Debtor's insurance policies. It is indisputable that Kalvin-Miller was fully apprised of the Debtor's manufacturing operations conducted in Rossville, Georgia[1] (the "Rossville Plant"). In fact, Kalvin-Miller became "broker of record" on the Debtor's workers compensation and employer liability policies covering the sewing machine (and related equipment) operators at the Rossville Plant.

5. At the time of Kalvin-Miller's appointment as "broker of record", the Debtor had full insurance coverage including coverage for its manufacturing facilities at the Rossville Plant. Kalvin-Miller, working in concert with Kerwick Curran, determined that Debtor could obtain even better protection through a different insurance company. Thus, by letter dated September 21, 1988, Kalvin-Miller provided the Debtor with a written proposal for its new "insurance program." A copy of this written proposal (including the attached "Insurance Specifications for Ben Cooper, Inc. D.I.P.") is annexed hereto as Exhibit A.

6. Upon my initial review of Exhibit A, I noticed that although the Debtor's business was properly described as including "mfg" (manufacturing) on the proposed application for Corporate Kidnap and Ransom/Extortion insurance-reference to the Debtor's manufacturing operations was omitted from the description of

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[1] The Rossville Plant is leased to Galiday, Inc. – a non-operating affiliate of the Debtor. Galiday was named as an insured in the binder policy. However, all losses sustained herein were sustained by the Debtor itself.

its operations contained on the first page of the specifications. To correct this omission, I immediately telephoned Derrenberger and confirmed that the Debtor's manufacturing operations should be referred. Derrenberger acknowledged the omission and further acknowledged that he was making the necessary revision to the specifications attached to the insurance proposal.

7. On September 28, 1988, the Debtor provided Kalvin-Miller with its check in the sum of $39,570 as and for the amount necessary to bind the new insurance policies to be issued by the Insurance Company. By check dated November 4, 1988 in the sum of $80,400,[2] the Debtor paid the balance of the insurance premiums due the Insurance Company. Annexed hereto as Exhibit B are copies of the foregoing two checks for insurance premiums.

8. On October 4, 1988 — consistent with the insurance proposal (Exhibit A) — the Insurance Company issued its binder policy (the "Policy") to the Debtor. The Policy indicated that it had been "bound" by Edelman of Kerwick & Curran. The Policy incorporated the insurance specifications of the Debtor — which were revised to reflect its "mfg" (manufacturing) operations. A copy of the Policy is annexed hereto as Exhibit C.

9. Upon issuance of the Policy, the Debtor was fully insured consistent with its business requirements and its obligations to this Court and its creditors. Included in the coverage was full protection against fire loss, *inter alia*, at the Rossville Plant.

10. As confirmed by the Policy, this insurance protection was provided to the Debtor (and its affiliate) by the Insurance Company with an effective date of October 1, 1988 and an expiration date of October 1, 1989. As stated above, the annual premium of $57,000 for the Policy was fully paid by the Debtor (the additional payments to Kalvin-Miller were to cover the premiums due on other policies).

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[2] The Debtor originally intended to finance this final payment but, thereafter, decided to make a cash payment.

THE FIRE LOSS

11. On January 6, 1989, there was a fire at the Rossville Plant which caused extensive damage to the Debtor's sewing machines and related equipment and facilities. Kalvin-Miller, Kerwick & Curran and the Insurance Company were immediately informed of this loss. Almost immediately on the scene of the loss where adjusters/representatives of the Debtor (Dietz International, Inc.) and adjusters/representatives of the Insurance Company (Harris Wileman Salvors and Starr Associates, Inc.). A detailed inventory of the machinery and contents were taken jointly by those representatives. At no time was there any inference that the loss was suspicious in any manner.

12. The Debtor never questioned that this fire loss — and the substantial interruption of its manufacturing operations occasioned by this loss — was covered by the Policy. The Debtor took all reasonable actions (to the best of its financial ability) to mitigate the substantial damage to its manufacturing and business operations occasioned by this loss. Despite such efforts, the Debtor has sustained losses which, to date, exceed the sum of $2,000,000 and which, upon information and belief, may approach $3,000,000.

13. The Insurance Company was made aware of the dimensions of this economic loss in January and February 1989.[3]

THE INSURANCE COMPANY DISSEMBLES

14. Rather than acknowledging its obligations to the Debtor under the Policy, the Insurance Company immediately entered into a course of conduct designed to frustrate the Debtor's rights under the Policy and its obligations to this Court and to its creditors. At the inception of that scheme, the adjuster/representative of the Insurance Company (Richard Wurzburg of Starr Associates, Inc.) indicated to Debtor's adjuster (Dietz

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[3] The information necessary to submit a formal proof of loss was compiled by the Debtor and submitted to the Insurance Company's adjusters by letter dated April 13, 1989. A copy of this formal proof of loss is annexed hereto as Exhibit D.

International, Inc.) in January 1989 that there was an issue as to whether the Policy covered the Debtor's manufacturing facilities and whether, in fact, the existence of these manufacturing facilities was properly disclosed to the Insurance Company. Thereafter, the Insurance Company submitted an extensive document request and demanded that the Debtor submit to an examination under oath. A copy of these discovery demands (in the form of a letter dated January 25, 1989 from Mound, Cotton & Wollan – the Insurance Company's attorneys) is annexed hereto as Exhibit E.

15. On March 1, 1989, I, on behalf of the Debtor, submitted to a full examination under oath and otherwise fully complied with all requests of the Insurance Company. Hundreds of pages of documents were provided by the insured and its attorneys to the attorneys for the Insurance Company (including, of course, a copy of the Policy and the insurance specifications of the Debtor). Clearly, the Debtor fully complied with its obligations under the Policy.

16. At the conclusion of my examination (at pages 95-96 of the transcript – copies of which are annexed as Exhibit F), the insured's counsel (Mr. Ginsburg) reaffirmed to the Insurance Company's counsel (Mr. Silverberg) that the Debtor urgently required a resolution of this fire loss in order to insure the confirmation of the proposed Plan of Reorganization and the consummation of such plan. At my examination, and thereafter, the Insurance Company's attorneys repeatedly inquired as to the status of the Plan of Reorganization.

THE PLAN OF REORGANIZATION

17. On April 4, 1989, this Court entered an Order of Confirmation confirming the Plan of Reorganization. A copy of the Order of Confirmation is annexed as Exhibit G. The Plan of Reorganization requires that the Debtor continue its insurance coverage in full force (Plan of Reorganization, page 17).

18. Pursuant to the Order of Confirmation, this Court has retained jurisdiction, *inter alia*:

a. for such purposes as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan [paragraph 8]; and

b. to hear and determine any controversies, suits, disputes, motions and claims that may be pending at confirmation, or which may exist on behalf of the Debtor [paragraph 8(b)(iii)].

THE INSURANCE COMPANY'S SCHEME BECOMES APPARENT

19. Several days after April 4, 1989, the Insurance Company's attorneys again telephoned the insured's attorneys to inquire as to the status of the Plan of Reorganization. At that time, the Insurance Company's attorneys were advised of the entry of the Order of Confirmation and were again advised that an expeditious payment for this fire loss would be necessary in order to consummate the Plan of Reorganization.

20. The Order of Confirmation became final and non-appealable on or about April 18, 1989. *On that very same day*, the Insurance Company commenced the State Court Action against the Debtor. A copy of the summons and complaint in the State Court action is annexed hereto as Exhibit H. In the State Court Action, the Insurance Company seeks a declaratory judgment that the Policy[4] was *void from inception*, and, therefore, that the Insurance Company has no liability whatsoever to the Debtor. On April 18, 1989, The Insurance Company also forwarded a letter and notice to the Debtor terminating its insurance coverage as of June 20, 1989 — copies of which are annexed as Exhibit K.

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[4] *Subsequent to* the January 6, 1986 fire loss, the Insurance Company forwarded to the Debtor what it asserts to be the actual insurance policy. This alleged insurance policy did not confirm to the Policy (Exhibit B) and, shockingly (but not surprisingly) did not provide protection for the fire loss. It is this alleged insurance policy that is the subject of the State Court Action. It is indisputable, however, that this attempt by the Insurance Company to deliver a non-conforming insurance policy *after* the fire loss — and contrary to the terms of the Policy then in effect — should not be countenanced by this Court.

THE RELIEF REQUESTED BY THE DEBTOR

21. By June 30, 1989, the Debtor will be required to make the final payment to creditors in the sum of approximately $2,000,000.00. With this payment, the Plan of Reorganization will be fully consummated. This final payment to the creditors is intended, as disclosed to this Court, to be financed by the Debtor. This financing, in turn, was based upon the Debtor's ability to generate receivables. These receivables, in turn, would be generated by, *inter alia*, the Debtor's manufacturing operations at the Rossville Plant. Due to the business interruption at the Rossville Plant, the Debtor may be unable to generate the receivables necessary to timely fund this final payment to its creditors.

22. Moreover, the Plan of Reorganization requires the Debtor to keep its insurance coverage in place. A condition for the Debtor's financing is that the Debtor maintain insurance coverage over its assets – failing which coverage the Debtor will not be able to obtain financing for its operations and its payments to the creditors. In fact, in the State Court Action, the Insurance Company also seeks a determination that such coverage was void from the inception thereof.

23. Accordingly, the Debtor urgently seeks a temporary restraining order (and, thereafter, a preliminary injunction) which compels the Insurance Company to continue to provide coverage under the Policy (including coverage for the Debtor's (and its affiliate manufacturing facilities) pending a final determination of the adversary proceeding to be commenced simultaneously herewith. The failure to provide such injunctive relief may result in irrevocable injury to the Debtor and to its creditors.

24. In addition, the Debtor seeks an order enjoining the prosecution of the State Court Action which was commenced in violation (and in utter contempt) of the Order of Confirmation. In that regard, the Debtor requests that this Court take jurisdiction over this claim/dispute which indisputably arose prior to

the entry of the Order of Confirmation. It is clear that the Insurance Company disingenuously attempted to circumvent the Order of Confirmation by waiting until it became final and non-appealable before formally and finally rejecting the Debtor's fire loss claim.

25. Because of the shortage of time before the next payment to creditors is due, the Debtor also seek an order permitting expedited discovery of the Insurance Company, and the other defendants, pursuant to the deposition notices which are annexed hereto collectively as Exhibit I.

26. Finally, there is (and can be) no prejudice to the Insurance Company (or to the other defendants) occasioned by the entry of this preliminary injunctive relief.

THE ADVERSARY PROCEEDING

27. Annexed hereto as Exhibit J is a copy of the Complaint in the adversary proceeding which the Debtor intends to commence simultaneously herewith.

28. The facts are clear: the Debtor paid $57,000 for insurance coverage; Kalvin-Miller acted as the Debtor's agent in procuring that coverage; Kerwick & Curran were "bound" that coverage on behalf of the Insurance Company; both Kalvin-Miller and Kerwick & Curran were fully apprised as to the insurance specifications of the Debtor — including the manufacturing facilities located at the Rossville Plant; insurance coverage was issued to the Debtor in the form of the Policy (Exhibit C); the Insurance Company now disingenuously disclaims liability to the Debtor and insists that it was never informed of the Debtor's manufacturing facilities.

29. From the foregoing, it is clear that either the Insurance Company is liable to the Debtor under the Policy *or* Kalvin-Miller and/or Kerwick & Curran are liable to the Debtor for their negligence and/or malpractice in failing to obtain such coverage.

30. Here the plot thickens even further: the Insurance Company is a subsidiary of the American International Group, Inc. ("AIG"). I am advised, and believe, that the insurance companies providing coverage for the negligence and/or malpractice of Kalvin-Miller and Kerwick & Curran are also subsidiaries of AIG. In sum, this "gaggle of geese" – the three subsidiaries of AIG – will ultimately dispute amongst themselves which one of them are liable to the Debtor for this fire loss. While they fight amongst themselves, however, the Debtor may be irreparably harmed. To the extent appropriate, therefore, I respectfully urge this Court to direct the defendants in the adversary proceeding (and their respective insurance carriers) to acknowledge their liability to the Debtor and to set about, in good faith, to determine the extent of the fire loss for which they (or certainly at least one of them) are indisputably liable.

WHEREFORE, on behalf of the Debtor, I ask this Court to enter the temporary restraining order (and, thereafter, grant the preliminary injunction) and to otherwise take such equitable action on behalf of the Debtor which may be appropriate in the circumstances.

/s/ Michael J. Sherman
Michael J. Sherman

Sworn to before me
this 8 day of May, 1989.

/s/ Lawrence Ginsburg
Notary Public

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

- against -

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

REPLY AFFIDAVIT IN SUPPORT OF DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL J. SHERMAN, being duly sworn, deposes and says:

1. I make this affidavit in further support of the motion of Ben Cooper, Inc. ("Debtor") for a temporary restraining order and preliminary injunction and in reply to the Memorandum of Law submitted by defendant The Insurance Company of the State of Pennsylvania (the "Insurance Company") submitted in opposition to our motion. Submitted simultaneously herewith is a Reply Memorandum of Law which addresses, and refutes, the positions of law asserted by the Insurance Company. The purpose of this affidavit is to clarify and highlight the Insurance Company's misstatements (and omissions) of fact.

Kerwick & Curran, Inc. is
the Insurance Company's Agent.

2. Shockingly omitted from the Insurance Company's Memorandum of Law is any reference to the fact that the binder insurance policy (the "Policy" – a copy of which is annexed as Exhibit C to my affidavit sworn to May 8, 1989) indicates that the Policy is "bound by" Kerwick & Curran, Inc. The Insurance Company's protest notwithstanding, Kerwick & Curran clearly acted on behalf of the Insurance Company in binding the Policy – no contrary conclusion can be reached in the circumstances. In the absence of discovery, the Debtor is not able to state conclusively the exact nature of the agency and/or contractual relationship between the Insurance Company and Kerwick & Curran. One thing, however, is abundantly clear: Kerwick & Curran had at least apparent authority to bind the Insurance Company and, in the Policy, exercised that apparent authority as its agent. The Insurance Company asks this Court to accept a definition of the Policy as a meaningless piece of paper entered into by the two agents of the Debtor. On the contrary – and as set forth in the Reply Memorandum of Law – this [binder] Policy is a contract for insurance coverage enforceable against the Insurance Company.

3. The Insurance Company asserts, in effect, that the Policy relied upon by the Debtor is a nullity. In its place, the Insurance Company relies upon a policy (the "Rejected Policy") which is annexed as Exhibit 1 to the Insurance Company's Memorandum of Law. The Insurance Company alleges that I "identified"

the Rejected Policy at my examination under oath. As previously set forth, the Debtor did not receive the Rejected Policy until after the fire loss on January 6, 1989. Nor, I am advised and believe, did the Debtor's insurance agent, Kalvin-Miller International, Inc., receive the Rejected Policy until after the fire loss. Moreover, as reflected in Exhibit 3 to the Insurance Company's Memorandum of Law, it appears that Kerwick & Curran was the Insurance Company's "broker" on this matter and that the Rejected Policy was forwarded, on November 28, 1988, to Kerwick & Curran.[1]

4. Immediately upon receipt of the Rejected Policy, the Debtor rejected the Policy and returned it. Accordingly, it is hardly fair to state that I "identified" the Rejected Policy at my examination under oath. Rather, I confirmed that I was "not familiar with it" (Insurance Company Memorandum of Law, Exhibit 2, page 20); and the insured's attorney clearly indicated that insurance coverage was provided by the Policy and not by the Rejected Policy (Insurance Company Memorandum of Law, Exhibit 2, page 26).

5. By documentary evidence, the Debtor has demonstrated a likelihood of success of proving that Kerwick & Curran was the agent of the Insurance Company in this matter.

This Court Has Properly Retained Jurisdiction Over This Claim.

6. Again, shockingly omitted from the Insurance Company's Memorandum of Law is the fact that this Court has expressly retained jurisdiction over this dispute/claim which arose prior to the entry of the Order of Confirmation. In addition to that express retention of jurisdiction, this Court has inherent jurisdiction over this "core" proceeding. In its Reply Memorandum of Law, the Debtor refutes the disingenuous position of the Insurance Company to the effect that jurisdiction does not properly

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[1] A review of Exhibit 3 reflects that Kerwick & Curran ("K&C") were the Insurance Company's broker on four separate engagements referred to on this one page — covering a one week period.

lie in this Court. In refuting the Insurance Company's arguments, we note that a fundamental premises of the Insurance Company's argument – namely, that a jury trial is required – is without basis in law.

The Attack On The Plan Of Reorganization Is Unfounded.

7. In a disingenuous attempt to avoid the clear language of retention set forth in the Order of Confirmation, the Insurance Company alleges that the debtor somehow wrongfully withheld from its creditors the fact that the Insurance Company would seek to void the Policy from its inception. This contention is baseless.

8. As this Court is well aware, the Plan of Reorganization envisions a 100% payment to creditors. In order to consummate the Plan of Reorganization, the Debtor disclosed that it would require substantial financing. Consummation was not dependent on the resolution of this fire loss claim.

9. Although this claim/dispute with the Insurance Company had arisen prior to the entry of the Order of Confirmation, the debtor believed that the Insurance Company was acting in good faith until the Insurance Company's lack of good faith was disclosed on April 18, 1989 – the date upon which the state court action was commenced and the Insurance Company sought to void the Policy from its inception. Thus, at the time of the Order of Confirmation, the Debtor believed that its insurance coverage was fully in place and that the amount of the insurance claim would be resolved expeditiously.

10. The Insurance Company's argument in this regard is, essentially, that the Debtor should have known at confirmation that the Insurance Company would *thereafter* seek to void the Policy from its inception. I respectfully suggest that this position is untenable. In sum, by the Plan of Reorganization, the Debtor provided its creditors with all information necessary to exercise their business judgment – and at the time of confirmation, the Debtor could not have known of the prospective scheme of the Insurance Company.

The Debtor will Suffer Irreparable Injury If The Policy Is Terminated Prior To A Determination Of The Adversary Proceeding.

11. The Insurance Company argues that it has a right to terminate the insurance coverage of the Debtor pursuant to the terms of the Rejected Policy. The Debtor believes that this position is unreasonable. First, the Debtor believes that its coverage (for which it fully paid the Insurance Company) is afforded under the Policy and not under the Rejected Policy. That coverage was for a one year period – until October 1, 1989. The Debtor is entitled to such coverage. In the circumstances, the Insurance Company should not be permitted to rely upon the Rejected Policy which, by its very nature, is suspect (and which, in material respect, is inconsistent with the Policy).

12. Moreover, by commencing the state court action and alleging that the Debtor committed serious acts of fraud against the Insurance Company, the Insurance Company has rendered it extremely difficult for the Debtor to obtain replacement coverage. Despite its diligent efforts, the Debtor has not been able, to date, to obtain replacement coverage – and the Debtor rejects the suggestion that it is obligated to do so.

13. I again respectfully urge this Court to insure, *pendente lite*, that the insurance coverage afforded to the Debtor pursuant to the Policy (including coverage for the manufacturing facilities of the Debtor) remains in place.

WHEREFORE, I respectfully request that the Debtor's motion for a temporary restraining order and preliminary injunction be granted in all respects.

/s/
Michael J. Sherman

Sworn to before me this 17 day of May, 1989

/s/ Lawrence Ginsburg
Notary Public
LAWRENCE L. GINSBURG
Notary of the State of New York
No.
Qualified in Westchester County
Commission Expires March 30, 1990

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon reading and filing the affidavit of Michael J. Sherman, sworn to on May 8, 1989, together with the exhibits annexed thereto, including the complaint in the Debtor's adversary proceeding and the notice of deposition, it is

ORDERED, that the defendants show cause before this Court, at the United States Custom House, 1 Bowling Green, New York,

New York, on May 17, 1989 at 2:00 p.m., or as soon thereafter as counsel can be heard, why a preliminary injunction should not issue herein enjoining the defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them, pending the final hearing and determination of the adversary proceeding: (i) from prosecuting the action commenced on or about April 18, 1989 in the Supreme Court of the State of New York, County of New York, entitled *The Insurance Company of the State of Pennsylvania* v. *Ben Cooper, Inc.* (the "State Court Action"); (ii) from terminating the Debtor's insurance policy issued effective October 1, 1988 with defendant The Insurance Company of the State of Pennsylvania (a copy of which is annexed as Exhibit A to the complaint in the adversary proceeding and as Exhibit C to the affidavit of Michael J. Sherman) – including the provision of coverage for the manufacturing facilities of the Debtor and its affiliates; and

It appearing to the Court that defendants are about to commit the acts hereinafter specified and that they will do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to the Debtor in that the prosecution of the State Court Action and any attempt to void the Debtor's insurance policy will violate the Plan of Reorganization and make it impossible for the Debtor to pay its creditors in accordance its Plan of Reorganization, confirmed by this Court April 4, 1989, and that the State Court Action violates the Order of Confirmation; and telephonic and written notice having been given to the defendants on May 8, 1989 as appears from the affidavit of Lawrence L. Ginsburg, Esq., sworn to May 8, 1989; it is further

ORDERED, that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained from proceeding with the State Court Action and from terminating the Debtor's insurance policy (a copy of which is annexed as Exhibit A to the complaint in the adversary proceeding and as Exhibit C in the affidavit of Michael J. Sherman) – including the provision of full coverage for the manufacturing operations

and locations of the Debtor and its affiliate pending the hearing and determination of this motion; and it is further

ORDERED, that pursuant to Rule 7030 of the Bankruptcy Rules, plaintiff shall take the depositions upon oral examination of defendants The Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. not later than 10 days from the date of issuance of this Order in accordance with the deposition notice annexed to the affidavit of Michael J. Sherman and defendants shall fully comply therewith; and it is further

ORDERED, that this Order shall expire within ten days after entry unless within such time the Order is for good cause shown extended for a like period, or unless the defendants consent that it may be extended for a longer period; and it is further

ORDERED, that service of this Order to Show Cause together with a copy of the papers hereto attached on defendant The Insurance Company of the State of Pennsylvania by service upon Mound, Cotton & Wollan and upon defendants Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. on or before May 10, 1989, at 5 p.m., be deemed sufficient service.

Issued at 3:35 p.m., May 9, 1989.

/s/C.B.

United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

In the Matter of — Case No.

BEN COOPER, INC., — 88 B 10484

Debtor.

----------x

May 17, 1989
United States Custom House
One Bowling Green
New York, New York 10004

OSC with TRO re: Staying prosecution of State Court proceeding terminating Debtor's insurance policy, etc.

BEFORE:

HON. CORNELIUS BLACKSHEAR,

Bankruptcy Judge.

APPEARANCES:

LOWENTHAL, LANDAU, FISCHER & ZIEGLER, P.C.
Attorneys for Debtor
250 Park Avenue
New York, New York 10177

BY: LAWRENCE L. GINSBURG, ESQ., of Counsel

MOUND, COTTON & WOLLAN, ESQS.
Attorneys for Insurance Company of
The State of Pennsylvania
125 Maiden Lane
New York, New York 10038

BY: COSTANTINO P. SURIANO, ESQ., of Counsel

OHRENSTEIN & BROWN, ESQS.
Attorneys for Kerwick & Curran
655 Third Avenue
New York, New York 10017

BY: MICHAEL D. BROWN, ESQ., of Counsel

JACKSON & NASH, ESQS.
Attorneys for Calvin Miller
International
330 Madison Avenue
New York, New York 10017

BY: VICTORIA STEWART, ESQ., of Counsel

PROCEEDINGS

MR. GINSBURG: When we were last before Your Honor on May 9th the Court entered a Temporary Restraining Order restraining the insurance company from terminating the Debtor's insurance coverage and enjoining the insurance company from prosecuting the State Court action and directing expedited discovery.

I would like to hand up Affidavits of Service of the Order to Show Cause and supporting Memorandum of Law, together with the originals of the Debtor's Reply Affidavit and reply Memorandum of Law, courtesy copies of which were delivered to the Court this afternoon (handing).

THE COURT: Those are originals?

MR. GINSBURG: Yes.

THE COURT: They need to be filed with the Clerk's Office. I have copies?

MR. GINSBURG: Yes. I believe the papers now submitted to the Court by the insurance company and by the Debtor clearly support the Debtor's position, clearly mandate the imposition of a preliminary injunction pending a determination of the adversary proceeding.

The Order of confirmation retains jurisdiction over this dispute. This dispute affects the administration of the Debtor and the consummation of a plan and beyond the express retention of jurisdictions that constitutes the Court proceeding.

At the very least, it may not be a serious dispute, that this is a related proceeding, and the Court should take jurisdiction.

I would highlight these points made in the memorandum.

A lot is made in the insurance company's papers to the effect that this court cannot entertain this trial. The basis for that claim is the following.

The insurance company ignores the terms of the Order of Confirmation. It ignores the express retention of this dispute by the Court.

The Debtor next says and concludes this is a core proceeding; it is not a core proceeding.

The insurance company next goes on to say it's a related proceeding. It may not be, but even if it is, they are entitled to a jury trial, and the recent case law in that area would preclude this Court from having a jury trial.

That is wrong. First of all, it's wrong because –

THE COURT: Counsel, you don't have to belabor the point. Most parties seem to use core and noncore to discuss jurisdiction, and that is not the case.

The cases that this Court has jurisdiction to hear is any matter that is related to a bankruptcy case, whether it's core or noncore.

This Court, the only difference that it makes is it's a matter how it will get up to District Court, whether it be by final Order by this Court, which it recently did in a case where it decided it was a noncore matter, that it will submit to the District Court findings of facts and conclusions of law.

As far as a jury trial, this Court can conduct a jury trial.

However, that is a motion that has to be made and I will make a determination as to whether the parties have a right to a jury trial.

If the parties feel this Court does not have the proper jurisdiction, then they can always make their request to the District Court to revoke the reference.

But as far as the jurisdiction of this Court, is that core and noncore has nothing to do with jurisdiction.

Is there anything else that the parties may wish to —

MR. GINSBURG: May I simply move on to the bottom line, here, which is the Debtor paid for insurance coverages, the Debtor received a binder.

It is called a binder, it smells like a binder, we manufactured facilities pursuant to the binder, and now the insurance company says that is a goose.

We don't know who this Kerwick & Curran are, they are not our agents. I guess the insurance company is saying that our two agents got together and bound each other.

We don't think that is a legitimate position, Your Honor.

I would add, Your Honor, that we have now been told that two of the three parties here are insured by subsidiaries of the American International Group, which was our belief.

Counsel to Calvin Miller has refused my request to disclose whether or not Calvin Miller is so insured.

We would ask the Court to perhaps make that inquiry, because we're back to the situation where the Debtor is out there fighting three hits, and we don't think that is right.

We ask that this thing move along on an accelerated basis to a resolution.

THE COURT: Very well.

MR. BROWN: My name is Michael Brown. We don't represent the insurance company, we represent Kerwick & Curran.

I am not really sure why it is Kerwick & Curran are here. They are a wholesale broker. They did place coverage with the State of Pennsylvania.

As far as they know, it's a perfectly valid policy. We got served with a Summons and Complaint. I don't really believe this is a judicial controversy.

THE COURT: Except that the insurance company is supposed to be bound by your actions, and they are saying they are not bound, and what we need is that we need all the parties here before us to make a determination as to what, if any, coverage the Debtor has.

MR. BROWN: I have not seen what the insurance company has said. I think there may be misnomers going along here.

The way the insurance industry works, our client is a wholesale broker. It is, in fact, the agent of the retail broker, in this case Calvin Miller, who in turn is the agent of the insured, in this case the Debtor, who sought to place insurance.

My understanding, although I have not had time to meet and prepare my client, I have just been retained, is, in fact, they did place coverage with the State of Pennsylvania Insurance Company, and that authorized underwriter with the power to bind the insurance company, State of Pennsylvania, did bind this coverage.

We're not the agent of the State of Pennsylvania, we have never held ourselves out to be, but we did place coverage on behalf of the Debtor with the insurance company, the State of Pennsylvania.

I would be surprised if the officials of the State of Pennsylvania would dispute that.

THE COURT: I think that is why we're here.

MR. BROWN: The reason I am standing up right now is that we've gotten a half set of papers which mentions something about a deposition tomorrow, and we have not had time to —

THE COURT: That we can — I am quite sure the Debtor would be more than reasonable in working out something that is mutually convenient for all the parties as far as the deposition is concerned.

MR. BROWN: We do want to reserve our right, if there's a judicial controversy, for a jury trial, and we move our right to set aside the reference here to this Court; we believe it's a State Court matter, to the extent it exists at all.

THE COURT: Very well.

MR. SURIANO: I represent the insurance company, the State of Pennsylvania.

Your Honor, we also submitted papers to you, and if I may, I would like to summarize our position.

We think that the Debtor's papers are bringing all of the substantive issues before this Court.

THE COURT: The reason they are doing that, they are asking for equitable relief, they are asking for an injunction.

Any time that you ask for an injunction you must show that you have at least a colorable case that you possibly could win in order for me to grant them that relief.

They are not at this time attempting to try their case as they are trying to convince this Court that I should issue a preliminary injunction in place of the TRO.

MR. SURIANO: I believe that is what they are trying to do, Your Honor, but I would persuade you not to do what they are asking you to do for a number of reasons.

First, we think that this case, if it belongs at all in the Federal system, must be heard by the District Court.

THE COURT: Why?

MR. SURIANO: As Your Honor alluded to earlier, we don't believe that this Court —

THE COURT: Don't use the word "jurisdiction."

MR. SURIANO: Well, that is my position, Judge. I understand you disagree with it, and that is —

THE COURT: Not only do I disagree, but you will find that all the Federal Courts disagree with it.

MR. GINSBURG: In Pied Piper, the issue in Pied Piper, Southern District of New York, it was not so much a question of jurisdiction, but a question of whether or not, because it happened to be the Insurance Company of Pennsylvania that was a Defendant in that case, too, because that company and my client's company was entitled to a jury trial, Judge Sweet withdrew that case from Judge Buschman and brought it —

THE COURT: That is not jurisdiction.

MR. SURIANO: I understand that.

THE COURT: You have the absolute right to see if one of the District Court Judges is willing to withdraw the reference.

Until someone does that, I am going to move along with this case in an expedited manner, because we have the issues here that can make or break confirmation, and I intend to see that it moves quickly.

Continue.

MR. SURIANO: We didn't feel it appropriate, Your Honor, in view of the TRO, to make a motion to the District Court without at least coming before you to argue our position.

THE COURT: You have my absolute blessings to go up to the District Court and ask them that the reference be withdrawn.

MR. SURIANO: In conjunction –

THE COURT: Good luck.

MR. SURIANO: Let me tell you why, Judge. It is because of the Pied Piper case that we feel we're correct.

THE COURT: I have not had the opportunity to read the Pied Piper case.

MR. SURIANO: We attached it –

THE COURT: Fill me in with the facts.

MR. SURIANO: There was a coverage dispute that excepted a – between an insured and my client before the insured went into bankruptcy.

The nature of the coverage dispute went to whether or not there was coverage and the extent of the damage, if any, was a burglary loss.

In that case, after the bankruptcy filing, of course, there was a lawsuit brought by the Trustee in the bankruptcy context, and my client asserted affirmative defenses, one of which was this case that my client requested a jury trial.

Judge Buschman in his opinion denied that, and said that there was also an issue of core and noncore, and there's a scholarly opinion by Judge Sweet in which he said, and I quoted in my papers, Judge Sweet concluded that the Seventh Amendment right to a jury trial which my client had in that case, and we think has in this case, precluded the Bankruptcy Court Judge from hearing, because as you alluded to earlier, the question is whether or not it's going to be a de novo trial or a final Order, and Judge Sweet said that in that case the District Court ought to hear it.

It took awhile for the whole process to wind its way up. My opponent cited only Judge Buschman's opinion and that was an oversight and – I don't think he disputes the veracity of that opinion.

We think we're even in a stronger position than my client was in that back then, and the reason, this is a Debtor in Possession. A Debtor in Possession stands in the shoes of a Trustee.

THE COURT: Just opposite, the Trustee stands in the shoes of the Debtor in Possession.

MR. SURIANO: They have the same –

THE COURT: Almost the same.

MR. SURIANO: And if that is the case –

THE COURT: Was that a Trustee in a liquidating case or a reorganization case?

MR. SURIANO: I think reorganization, Your Honor.

Our point is that the Debtor in Possession who applied for insurance through – and now we have on the record the clear statement that at least one – we have not heard from one of the counsel, but I think she'll take the same position – that neither of the insurance brokers in this case are the agent of the insurance company, which is the position posited incorrectly by the Debtor In Possession; they are his agents.

And to respond to –

THE COURT: No, you can't jump from his statement that he is not your agent to making him now the Debtor's agent. I don't think that he indicated that on the record.

MR. SURIANO: Well, it's our position, Your Honor – I thought he had, I may have misheard – it's my client's position that the two insurance brokers are absolutely not the agent of the insurance company, but are, in fact, the agent of the Debtor in Possession.

But to return to my main point, which was because we're dealing with a Debtor in Possession, that Debtor in Possession does not have any greater rights than any other person in the world would have in a commercial dispute, whether it be with Con Edison –

THE COURT: Wait. You may be right in what you are saying, but you are not addressing the issue of whether or not a preliminary injunction should be in place, because if I don't clear the preliminary injunction, you win without even having to go through this Court.

MR. SURIANO: My main request is that you do not issue a preliminary injunction, that you lift the stay.

THE COURT: I don't have to lift the stay for you to make a request in the District Court to revoke the reference.

MR. SURIANO: As I said –

THE COURT: But I will put in the preliminary injunction to make sure that is the route that you take.

MR. SURIANO: If we have to, we will take that route.

So our position is stated for the purposes of the record, just to round out the argument, we would request that you do lift – I understand you have indicated that you will not –

THE COURT: Why do I need to lift the stay?

MR. SURIANO: You have granted a stay also as to the cancellation issue, which I was going to get to.

THE COURT: You win without having to argue your case before either this Court or the District Court if I do that.

MR. SURIANO: No, respectfully, no; if your Honor lifts that portion of the stay which went to the cancellation issue without lifting the portion that goes to the State Court action, I am still faced with a matter in the Bankruptcy Court which I wish to avoid.

THE COURT: The only thing that you can avoid – I thought I made it crystal clear, the only way to avoid this issue in the Bankruptcy Court is to get the District Court to revoke the reference, because your case should not be heard in the State Court when I have jurisdiction over the asset of the Debtor.

And if you read the term property of the estate, it is all encompassing, including choses in action.

MR. SURIANO: Your Honor made it eminently clear that is the route we have to take, and we will.

What I am asking the Court to do is to consider our position vis-a-vis that portion of the stay that goes to the cancellation notice.

Let me back up a step. The TRO which was granted had three elements. The first was to stay our State Court action in New York County.

The Court has told me already where it's going.

The second branch of the stay was as part of our belief that because of the material misrepresentations of the Debtor and/or its agents in totally, and we believe falsely describing to us the nature of its operations, and the extent of the loss which it claims it sustained, we believe we have a right to have the policy declared void ab initio.

Concommitantly we issued a notice of cancellation pursuant to the contract that the Debtor seeks to enforce and we seek to have declared void ab initio, which notice of cancellation takes effect on June 20th.

In Your Honor's Order you restrained us from effecting that cancellation, and what I am arguing to you now is, notwithstanding your decision not to lift the stay as to the State Court action, you should, at least in the interim, while we go to the District Court and have this issue resolved, lift the cancellation issue.

Why? What is the harm to them and what's the harm to us? The harm to us is that we are on a risk which we believe we should not be on because of the material omissions and misrepresentations.

Now, they obviously have a substantive disagreement with that point. They think they should be covered.

However, the contract which they seek to enforce and we seek to nullify by its very terms has a cancellation provision which allows us for the specific reasons of misrepresentation, which we asserted as the basis of part of the reason for our cancel, by the stay, the Court is creating coverage where none would exist.

THE COURT: I disagree. If you are successful in convincing this Court or any other Court that there was — that there were misrepresentations, material misrepresentations, then it is void ab initio, and if it's void ab initio, it's that you don't have the coverage, not only of the issue that is before us today, as far as the loss that was suffered, but nothing that would occur in the future.

So I don't see how that — if you are correct in your contention, I don't see how you are prejudiced by the stay staying in place as far as the cancellation.

MR. SURIANO: Life being what it is, and there is a chance, and that is what insurance is all about, that this company would sustain another loss just in this period, and we're not —

THE COURT: Even if it does, and you don't have to cover because of material misrepresentation by this Debtor, that means that you don't have to cover anything in the past or in the future.

But if you do have to cover, and they paid you your premium, that is the purpose of having insurance.

MR. SURIANO: The third branch, the third strike of our application – perhaps we can work this out – the necessity for expedited discovery.

THE COURT: The problem with that – you see, this case was confirmed on the assumption that this company had proper insurance.

If it – that is one of the reasons why I'm putting – why I decided – if you go back to State Court, we know how long that will take.

I can get this matter heard and resolved within a short period of time, as it cannot be done in the District Court.

If this case is not consummated, and that is another art term in bankruptcy, which is supposed to occur substantially within a short period of time after confirmation, that creditors can come in and ask this Court to revoke its Order of Confirmation, which means all this work we've been doing in this case since close to the beginning of 1988 is for naught.

And that is one of the reasons that they ask for expedited discovery and one of the reasons I granted it.

It seems to me that right now, from what I hear from the parties as far as the issues go, that discovery should not take an inordinate amount of time.

If you decide – if the Judge up in the District Court wished to revoke the reference, just think, you can walk up there to him with a case that all of the discovery has been completed.

MR. SURIANO: If I may, Your Honor, I respectfully disagree. I am in no way trying to impugn the hard work that this Court and the parties did in the bankruptcy. We're aware of that.

From my client's point of view, it's not part of the bankruptcy.

THE COURT: It is now.

MR. SURIANO: I am getting the message, Judge. We think that this policy was not referenced – strike that – the policy of my client is nowhere in any of the papers that I have seen referred to by the Debtor or any of its attorneys, it's not in the plan.

The only reference to insurance that I have seen, Judge, and I am not going to represent that I looked at all the papers in the limited amount of time, is what you said, the Debtor must maintain insurance.

They didn't have a claim as part of the plan that was confirmed on April 4th to this –

THE COURT: Yes, they did. That was – part of the funds to be used in confirmation in the paying off of creditors was based on the fact hopefully they were going to receive funds from the insurance company for the loss.

MR. SURIANO: I defer to the Court, I didn't see that in any paper. I request that counsel for the Debtor provide me with where they said that the $2 million policy –

THE COURT: I don't know if it was said specifically.

MR. SURIANO: They didn't submit the – they didn't submit it until after. How did they know the claim amount? I am at confusion.

The claim, as I understand it – by the way, we believe it's grossly exaggerated and that will form another basis for denial of the claim – but let's assume it is $2 million, that wasn't – I don't think it was, according to the papers in Mr. Sherman's

Affidavit, formulated by the Debtor in Possession's public adjuster, Dietz & Company, until April 13th, and then transmitted to the insurance company sometime thereafter.

I think this Court signed the Order on April 4th.

THE COURT: I don't remember when it was.

MR. SURIANO: I would ask that you allow me the opportunity on this point to do a little more research, because I don't think that the specific policy proceeds are contemplated as an asset of the Debtor to satisfy the bankruptcy plan.

THE COURT: Notwithstanding Section 541?

MR. SURIANO: I am speaking specifically. You are talking about – I am speaking about specifically, Your Honor.

I will go back to my third strike and then I will sit down, if it is a strike. I might get to first base.

We don't see the necessity of having the discovery – I understand what you are saying in terms of the speed – at least until such time as we can make – and I am willing to do it on an Order to Show Cause basis – at least get before the District Court for it to determine whether or not it wishes to withdraw this case from this Court.

And, yes, discovery should be quick in a bankruptcy matter; however, there are other issues involved.

There are the convenience of at least two of the other parties, and my client is supposed to be deposed on Friday, which what we're saying is, can you order that the discovery be held off until next week to give us a chance to go into the District Court?

THE COURT: You got to first base. Sure; in fact, I think if you had asked counsel, they would probably have agreed to that.

MR. SURIANO: I did ask counsel, and with all due respect, they said no.

Thank you.

MS. STEWART: I am with the firm of Jackson & Nash. We represent Calvin Miller International.

I wanted previously to address the third issue. We're not party to the State action, and therefore, the two claims of relief do not affect my client.

However, we've been served with a Notice of Deposition and demand to produce documents.

My firm was retained this Monday, May 15th, in this matter. On Tuesday, May 16th, I called counsel for the Debtor and asked that assuming that the Court granted expedited discovery, that we could reschedule the deposition of Mr. Derenberger until possibly the 22nd.

I explained that we had just been retained and also that Mr. Derenberger was out of town and I had no chance to speak with him.

Mr. Derenberger is due to return tomorrow. I put my request to counsel for the Debtor and, of course, I was also not given the extension.

Your Honor is so sure that counsel for the Debtor is so reasonable, I would like a guarantee of that.

THE COURT: If I ordered it, then he will be reasonable.

MS. STEWART: I would request, however, a possible two-week extension, if possible.

We've been served with a demand to produce documents. That is rather vague and extensive, and in order to prepare my client and be familiar with the case, I think we need at least two weeks.

MR. GINSBURG: May I be heard?

THE COURT: Address the issues as to the funds to be used for confirmation.

MR. GINSBURG: I was not counsel to the Debtor in Possession on confirmation. Neither at consummation or in our papers do we say that these funds, specific insurance proceeds, are to be used to fund consummation.

What we say and what the Debtor testified to at confirmation, is that in order to consummate they will have to finance; in order to finance they have to have insurance.

Because of the business interruption, they have not been able to generate the receivables necessary to finance and they have a risk of not having insurance.

The Debtor as we speak today doesn't know, and would testify if called upon, whether it will be able to consummate.

Clearly these issues are so inextricably bound and I am told by Mr. Sherman in discussions with creditors, creditors representing ninety-five percent of the debt here were fully advised by the Creditors Committee of the fire loss.

If I may respond, I realize I might appear to be unreasonable, but I will take a chance.

Two things. Number one, Mr. Suriano said that the insurance policy that we seek to enforce and they seek to void gives them the right to terminate.

That is not true. The insurance policy that they seek to void is not the insurance policy that we paid money and got.

It wasn't received by the Debtor until after the fire, it doesn't conform to the binder that we paid for, that was bound.

The binder doesn't provide for any right to terminate, and we argue seriously that it's that binder policy covered by Kerwick & Curran that we're entitled to collect under.

As far as deposition, accelerated discovery is quite appropriate and important here.

THE COURT: I agree, but let's not rush to judgment here.

One thing this Court does not encourage is it does not encourage depositions in such a manner that the parties will then have to do it again, because the other parties have not had the opportunity to provide all of the information that is required in order to do an intelligent deposition.

If you have asked for documents and those documents need to be produced and you need to review them, they would need to have them provided to you, and then after the deposition find that there were other questions that you needed to ask.

When I say expedited, usually the Court looks at expedited as something less than thirty days, but not tomorrow.

MR. GINSBURG: With all due respect, Your Honor, if Mr. Suriano had told me that he was going to go move imminently in the District Court and seek a TRO, I might have accommodated him.

THE COURT: I don't think –

MR. GINSBURG: I don't think there's a basis for accommodating him, if I might make my pitch.

The argument here that Pied Piper mandates this Court or mandates the District Court to pull this case away is wrong.

The Pied Piper case is distinguishable. In Pied Piper there was no express retention of jurisdiction by an Order of Confirmation.

In Pied Piper most significantly there was a money damage claim at law, and the whole inquiry was if you have a Seventh Amendment right to a jury trial, maybe you shouldn't have a jury trial if it's a waste of judicial economy.

THE COURT: I know that we can –

MR. GINSBURG: In the New York Court of Appeals you can't argue – this is an argument to rescind an insurance contract, it's an argument of equity; there is no right to a jury trial.

On that basis I don't think discovery should be put off.

THE COURT: I am not putting it off, I am just basically extending it to sometime out in the future that is reasonable, so the parties – I will set the schedules, because it appears that is something that I am going to have to do anyway.

Hopefully, the parties, even if the District Court decides to withdraw the reference, at least you will have it ready to go to trial when you get there.

What is a reasonable date for your clients to be available for a deposition, Mr. Suriano?

MR. SURIANO: Bearing in mind that I would like to make the motion that I indicated that I would, I would agree with co-counsel's suggestion that we put everything off for two weeks.

THE COURT: No, we don't put things off for two weeks. When will your clients be available for deposition and when can you provide the documentation requested by counsel for the Debtor?

MR. SURIANO: I don't have a calendar before me, but within that two weeks, let's pick a day and I will do it.

THE COURT: Fine, but I want to make sure that it's a date that you will be available and that your client will be available, and prior to that date you will have provided the Debtor with all the documentation that they require.

MR. SURIANO: The 31st, Wednesday.

THE COURT: Fine. Counsel?

MS. STEWART: I can have my client available Friday, June 2nd.

THE COURT: Very well.

MR. BROWN: Can I have June 7th, I have some engagements?

THE COURT: Certainly.

MR. BROWN: Your Honor, we will be prepared to serve document demand by the end of this week. I assume they will be honored prior to the deposition.

THE COURT: It doesn't make sense to have the deposition without the documents.

MR. BROWN: Can I just ask, because this is being expedited, Mr. Suriano made some references to misrepresentations that were made to the State of Pennsylvania, and he said something about the extent of damages.

He also said the nature of the operations. Can I ask him to tell us exactly what it is that his client believes was not told to him?

THE COURT: No, that is to wait until the actual trial.

First of all, he may have a problem with attorney-client privilege, he is not under oath, and the best he could tell us is upon information and belief, which doesn't do us any good at all anyway.

MR. BROWN: He brought an action saying that there were material omissions.

THE COURT: That is where it's going to be very interesting, at the depositions, that I am sure you all want to attend each others' depositions.

I think at that point it will be gone through at great length.

MR. BROWN: I am sure it will.

MR. GINSBURG: One last time, might I ask that we agree before the Court that the documents will be produced perhaps two days before each deposition?

THE COURT: We need it more than two days. Since I am allowing this – I have been so generous – documents should be provided no later than May 26th.

MR. SURIANO: I have no problem with the date, but the nature of the document request –

THE COURT: It's too broad?

MR. SURIANO: Yes.

MS. STEWART: It's very broad.

THE COURT: Can you narrow it down?

MR. GINSBURG: I don't believe it's broad.

MR. SURIANO: It asks my clients as well as theirs that every policy in the United States be produced in which my client insured a manufacturing facility operating in A, a nonsprinkler, brick facility or, B, a sprinkler, brick facility, not only in Georgia but throughout the United States, and I am quoting directly from number 2.

THE COURT: I think that can be narrowed.

MR. GINSBURG: May I explain why that is not broad?

THE COURT: You're asking him to search all his records –

MR. GINSBURG: We need it. Under the Insurance Law, Section 3105 defines what a material misrepresentation is. It says, "A material misrepresentation" –

THE COURT: Why can't he give you a sample? Why can't –

MR. GINSBURG: A material misrepresentation is one – it's only material if the knowledge of the facts would have led to the refusal by the insurance company to deny coverage.

It specifically says 3105, Subdivision C, "In determining the question of materiality, evidence of the practice of the insurer which made such contract with respect to the acceptance or rejection of similar risks shall be admissible."

We're entitled to discovery and to prove had they known, which they claim they didn't, that this was a sewing machine manufacturing facility, they still would have written the policy.

THE COURT: What about a request –

MR. GINSBURG: I would start with all policies written in Georgia.

THE COURT: Why don't you just ask if there's such a policy, and if so, how many. With a sampling of one –

MR. SURIANO: That is a Herculean task, even what you are suggesting. We're a big company.

THE COURT: How are they going to prove their case if you don't give them that discovery?

MR. SURIANO: That does not go to the misrepresentations, what they were.

THE COURT: Then you have to tell us what the misrepresentations are.

MR. BROWN: That is why I asked it.

THE COURT: We're talking not about the case in chief, we're talking about discovery.

If you are telling me that it's not something that they will require in order to make their case, you are going to explain to me why it is that they don't need it.

MR. SURIANO: Your Honor, even to begin – I am just stating facts, because I have spoken to my client.

In order to retrieve even the information that you –

THE COURT: No, you can't tell me it's difficult, that is not one of the standards.

You have to explain to me why it is that they will not need it for their case in chief.

MR. SURIANO: My understanding of the misrepresentations are, and I want to be very careful, because as I am saying –

THE COURT: Upon information and belief.

MR. SURIANO: I have not had a chance to develop it yet, but based on the information that is in our possession, this Debtor through its agent did not disclose the significant fact, material fact, that it was a manufacturer of costumes.

It was represented to us that what they did is simply a retail operation with several specific locations which were represented to be warehousing facility.

One facility had a showroom in it. We now find out after the loss and the investigation, that, in fact, they were manufacturers.

We also believe that there was a misrepresentation or an omission, if you will, with respect to the nature of one of the – with respect to the nature of the specific building in Georgia where the loss occurred.

THE COURT: The location?

MR. SURIANO: Yes.

THE COURT: I am not going into that at this point.

Could that change?

MR. GINSBURG: No, it underscores the need. They are saying we never told them we were a manufacturer.

In order to prove that was material, they have to demonstrate that they wouldn't have issued the insurance.

I am entitled to know whether they issued insurance on manufacturing facilities.

THE COURT: I think he is correct.

MR. SURIANO: That requires we're going to have to search our files –

THE COURT: You do have computers, don't you?

MR. SURIANO: No, Judge. We have some computers, but we don't have the submissions of what individual insurance had been rejected and accepted throughout the United States, proposed to our company –

MR. GINSBURG: I will start with accepted.

THE COURT: Yes, accepted.

MR. SURIANO: If your Honor is directing it, I will try.

THE COURT: Give it your best shot.

MR. SURIANO: Judge, even if I hit a home run, it is –

THE COURT: This Court is well aware of the task. Do what you can by the 26th. That is not necessarily an issue that may or may not be that important for deposition as it would be for the trial itself.

You can start on it now. Do as much as you can for the Debtor by the 26th, and all you can't do by the 26th, you continue to work until you have produced all those documents at least by the time that the District Court of this District decides to hear that matter.

MR. GINSBURG: That just guaranties that we don't get anything at the deposition.

I would ask at the least that the information, that the fact of such insurance being offered, be produced in some form, even if the backup documentation is not.

They have had adequate notice of these proceedings to do that.

MR. SURIANO: Were all

THE COURT: Counsel, I don't want to start giving him remedies under the Federal Rules of Civil Procedure and taking a negative inference by the fact that you do not produce something that will give him an idea as to what your client may or may not insure.

What I would suggest of course, I may not hear it , but what I suggest is you do due diligence in getting him by the 26th as much of that information as possible.

MR. SURIANO: I fully intend to comply with your order, and with all respect, I will try to move next week to get it stopped.

I don't wish to seem facile about what I just said. Please

THE COURT: I understand your problem.

MR. SURIANO: We think the Court is overbalancing its concern for the Debtor

THE COURT: They have got a lot of creditors out there that I have to concern myself with.

If it was just the Debtor, just an issue where the Debtor had paid all of it's money post confirmation, and this was a situation whereby it was going to fatten the coffers of the Debtor, as opposed to going out to pay creditors, I would not even allow expedited discovery.

This is a matter I really don't want to break apart, because having lived with this case for over a year and seeing this case come in in the condition it was in, I know this case is going to come back, those creditors, and all the professionals and all the others in this case, they will see almost nothing in Chapter 7, and that is the nature –

MR. SURIANO: It may happen.

THE COURT: That may happen. You may win this case.

MR. SURIANO: That is through no fault of our own, if that happens.

THE COURT: But you may very well wind up a winner. If that is the case, so be it, but I am not going to let you win by default.

You have to prove your case, at least before myself or before a District Judge.

MR. SURIANO: The last point, which is in response to one of the things that my opponent said is this, they can go out into the marketplace and try to place insurance for themselves.

THE COURT: That takes money. That is why they are in bankruptcy. They don't have an awful lot of that.

MR. SURIANO: I don't know what their financial condition is. They're in bankruptcy, so I assume they have a problem.

Again, as a last effort at trying to make – we're not responsible for whatever situation the Debtor finds itself in.

THE COURT: But you may well be, if later on it finds out that maybe you should have had coverage and you should have paid for the loss.

MR. SURIANO: I go back to the point – and they have admitted before you that the specific proceeds were never a part of the plan which you –

THE COURT: What they have said is that they needed all the proceeds, because like an alternative route, the other route was to generate enough accounts receivable, and they are telling me now that is not happening.

They – this is a long way from Halloween, and they make masks. They –

When is Mardi Gras? That is over also, that is February.

MR. SURIANO: Very well, Your Honor, thank you.

MR. BROWN: Your Honor, with regard to the document production, so that I don't lose sight of the forest for the trees, it should not be difficult to make quick production of the underwriting file for this risk.

That doesn't require computer analysis or great details. Could we ask the insurance company to at least make quick production of that file?

THE COURT: Here you have the experts that are saying that it shouldn't be that difficult.

MR. SURIANO: Really, they may be experts in their – the nonprivileged documents in the underwriting file can be produced. I don't have a problem with that.

However, it's a two-way street. I would request that my co-Defendants expeditiously produce a complete file in this case.

THE COURT: That is going to be done, I think.

MR. BROWN: We have no problem with that. We can do that within the next week.

MR. SURIANO: We don't have a disagreement on that.

MR. BROWN: I don't want to see the specific file in this case get lost, in the difficulty of producing these other things that have been asked for.

THE COURT: Very well. The Debtor's request for a Temporary Restraining Order was granted. You may submit an Order to that effect.

The parties are to move –

MR. SURIANO: I am sorry, Your Honor, I am going to reopen a can of worms here, but I have to do it.

It would seem to me that having my client go first will not resolve many of the issues, if, in fact, we're after an expeditious search of the truth, and since the Debtor noticed the deposition of the two brokers before they noticed mine, the only reason I suggested the 31st was in an effort to be expeditious as possible.

I am not trying to avoid the dates. I can do it the 31st. My request is I think it will be better for the case, both for the bankruptcy aspect of it, if the brokers go first, and I –

THE COURT: I don't really see it that way. I think that right now you are the Defendant in chief.

I think that what they are saying is that they want to depose the brokers just to see basically what they – what transactions they have with your client.

I think that in their minds your client is the culprit, not the brokers. So –

MR. SURIANO: Even though they sued them?

THE COURT: They want to make sure that they did what they were supposed to have done, as I see it.

As far as the deposition is concerned, I don't think it matters that much one way or the other as to who goes first.

Anything else?

MR. SURIANO: No, Judge.

THE COURT: Your motion is granted for the Temporary Restraining Order. The parties are to produce all documents possible, with minor exception, by the 26th.

The insurance company has to be deposed on May 31st. Your client has to be deposed on June 7th, Mr. Suriano and yourself, Ms. Stewart on June 2nd.

MR. GINSBURG: Ms. Stewart, does AIG insure Calvin Miller? I want to know if we have three heads of the same company that we're fighting.

THE COURT: Excuse me?

MR. GINSBURG: AIG is the parent company of the Defendant –

THE COURT: Do you wish to answer that now or have him –

MS. STEWART: Make your request. Let him do it the proper way.

MR. SURIANO: Judge, one thing, we need the Debtor's deposition.

THE COURT: Absolutely. I was wondering when someone was going to ask that.

MR. SURIANO: Can we do it on the 9th?

THE COURT: Before the 9th.

MR. SURIANO: Next week, Judge?

MR. GINSBURG: I believe Mr. Sherman's schedule – he is not going to be in the country. They also had five hours of deposition on March 1st in their office.

It's not as if they have not heard the Debtor's side of the story.

MR. BROWN: June 9th is fine for us.

THE COURT: All parties are to exchange whatever they give to each, they give to the other.

MR. GINSBURG: The Order submitted, I believe, Your Honor, said Temporary Restraining Order. Shouldn't that say the preliminary injunction is granted?

THE COURT: You are right, preliminary injunction.

MR. SURIANO: I can't do it June 12th.

THE COURT: What about before June 9th?

MR. SURIANO: I am not going to be available for that.

MR. BROWN: What about the 8th?

MR. GINSBURG: Fine.

THE COURT: Fine, the 8th.

MR. GINSBURG: Thank you.

CERTIFICATE

I, THERESA GLABIK, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/ Theresa Glabik

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC., M-47 (JMW)
AIMWELL PRODUCTS, INC., and
BEN COOPER SALES CORP.,

BEN COOPER, INC.,

Plaintiff,

v.

THE INSURANCE CO. of the STATE of
PENNSYLVANIA, Adv. Pro. No.
KALVIN-MILLER INTERNATIONAL, 89-5685 A
INC., and KERWICK & CURRAN, INC.,

Defendants.

----------x

May 31, 1989
4:45 p.m.

Before:

HON. JOHN M. WALKER, JR.,

District Judge

APPEARANCES

LAWRENCE GINSBURG,
Attorney for plaintiff

COSTANTINO SURIANO,
Attorney for defendant Insurance Co. of
The State of Pennsylvania

VICTORIA STEWART,
Attorney for defendant Kalvin-Miller

GEOFFREY W. HEINEMAN,
Attorney for defendant Kerwick & Curran

(In open court)

THE COURT: Who is representing who here? The insurance company?

MR. SURIANO: I am. I am Costantino Suriano from Mound, Cotton.

THE COURT: Why don't you fill me in briefly on what happened in the bankruptcy court here?

MR. SURIANO: Yes, your Honor. The debtor in possession filed for bankruptcy roughly in April of 1988. In October of 1988, while it was a debtor in possession, Ben Cooper through its chief executive officer, Mr. Sherman, retained as we understand it the co-defendants, Kerwick & Curran and Kalvin-Miller, to procure a number of insurance policies and those brokers did that. In the course of procuring policies they procured one from ourselves, the Insurance Company of the State of Pennsylvania. In that process, however, we have alleged, the brokers made material misstatements of fact and misrepresentations and omitted key facts.

The debtor, Mr. Sherman, and in his affidavits and in his examination under oath transcript admits and sets out that he himself spotted the omissions before – right after they were made to the various insurers, including ourselves and put his agents on notice of the omissions. The omissions which are very germane to our case, Judge, basically they misdescribe the nature of what Ben Cooper does. We were not told that it was, I understand, the major manufacturer of Halloween costumes in the United States.

There are other misrepresentations which we won't get into at the moment.

THE COURT: The Halloween costume misrepresentation, is that a critical one as opposed to Christmas costumes?

MR. SURIANO: No. But the key there is manufacturing. We were told that that was simply a warehouse/retail operation. In fact, they have many many sewing machines and a major manufacturing operation throughout the United States. The premium that would have been in charged, indeed the form of policy that would have been issued is completely different.

THE COURT: When they are in manufacturing.

MR. SURIANO: Correct. I don't think there is any dispute about that. When the policy—

THE COURT: So you think you've got a pretty good defense because there was a fire and they are now making claim to you against that and you think you have a good defense to the claim.

MR SURIANO: Yes, we have a defense not only to the claim but we are seeking that the policy be declared void from inception and we think there has been fraudulent exaggeration of the claim. It is a state court contract dispute.

THE COURT: It in involves state law. We have on occasion all too often heard state law questions. But there you have it. It is a state law claim.

MR. SURIANO: We agree. We think that the critical distinction here and one that the bankruptcy court did not find in its discretion applicable and we disagreed with it and in all due respect to Judge Blackshear is what is set out in Pied Piper. And in my papers I have given the court the decisions as I gave Judge Blackshear those decisions.

The distinction is that here we have a post-petition debtor in possession who applies for and obtained insurance. And now,

in the regular course of its operation there is a contractual dispute with that insurer. The insured debtor in possession also has a dispute in negligence and in contract with its agents the brokers who supposedly, if one believes the debtor, didn't provide what they should have provided.

THE COURT: In other words, you want this case basically turned over to state court to be decided in state court.

MR. SURIANO: Yes.

THE COURT: Let me ask you something. First of all, what are the implications of whether there is a core or noncore proceeding as far as your application is concerned?

MR. SURIANO: I think it is critical. I specifically asked Judge Blackshear during oral agent and in my papers and even when I presented a counterorder to make that determination.

THE COURT: Did he?

MR. SURIANO: He didn't expressly address that. We say if you read the transcript and if you read his order it is an implicit determination by him that it is a noncore but related case. We asked him to do it. He didn't submit an order one way or the other.

THE COURT: What is the effect of whether it is core or noncore?

MR. SURIANO: Assuming that there is jurisdiction, and that's my first point.

THE COURT: Assuming that there is jurisdiction.

MR. SURIANO: The determination would be whether or not my client and indeed the co-defendants have a right to a jury trial.

THE COURT: If it is core what happens?

MR. SURIANO: If it is a core case there is some law that would stand for the proposition that Judge Blackshear can in the auspices under his jurisdiction, if you will, hear the case.

THE COURT: Without a jury?

MR. SURIANO: I am not sure if he can even do it on this case without a jury.

THE COURT: There is a greater chance that you would be subjected to a nonjury case if it is core.

MR. SURIANO: Absolutely.

THE COURT: Nonjury trial. If it is noncore?

MR. SURIANO: Then, if it is noncore we would the following, and it is set out in the statute, Judge Blackshear, he has to make conclusions of fact and law which can be submitted, if you were the judge, to yourself or to a district court judge and then, unless all sides agreed, we could, which in this case we do not, we would have a de novo trial.

THE COURT: You mean regardless of what he has decided you are not going to agree to what he decides.

MR. SURIANO: We think we have a right not to be in the bankruptcy court and, with all due respect to that court, we don't think that is that court.

THE COURT: Assuming he reached conclusions of fact and law and let's assume hypothetically they went in favor of the debtor and then those conclusions, they would be in the form of conclusions recommended to this court if it is noncore, is that right?

MR. SURIANO: That's right.

THE COURT: Under those circumstances what posture would you be in?

MR. SURIANO: We would be in the posture because we would have to come before you and have a de novo determination and have to retry, and we say with a jury, the very same things that we would have done already before Judge Blackshear.

And we think, and the cases that we have cited, Pied Piper and Blue Point, this court, Judge Sweet, clearly held in this kind of context it cannot be done.

I recognize that—

THE COURT: When you say it cannot be done, what cannot be done?

MR. SURIANO: Judge Sweet held that in the context of a jury trial demanded in an insurance case, it happened to be my same client, that clearly the bankruptcy court in that noncore matter could not hear that case. And what he did was he withdrew the reference and it was determined I believe by jury trial.

I think the case settled thereafter.

THE COURT: And then he tried it to a jury. Withdrew the reference and he was ready to try it to a jury and it settled.

MR. SURIANO: I think the case settled.

THE COURT: The key is whether it was core or noncore. That's a very critical determination, is it not?

MR. SURIANO: Assuming that the jurisdiction issue is decided against us, yes it is one of the critical distinctions. We asked the judge to make that determination and he explicitly did not but implicitly I think that he did if one reads the transcript and the exchange between the court and myself as well as the correspondence.

THE COURT: Why is the best approach to remand this for an express determination one way or the other before Judge Blackshear as to whether it is core or noncore?

MR. SURIANO: We suggested that but the court made it very clear, and I am using his words, that I had his blessings to come this this district court to make any argument.

THE COURT: But in the first instance it seems to me that it is for the bankruptcy court to determine whether it is core or noncore.

MR. SURIANO: And we asked him to do it and my position here is your Honor is that he has already spoken by his silence.

THE COURT: Maybe he has and maybe he hasn't but he has been silent on the subject. I think that the appropriate thing for me to do is to remand this solely for a determination by the bankruptcy judge as to whether this is core or noncore. He can do it or the basis of the existing record. No new facts need be adduced. He can hear counsel very briefly on the issue. Perhaps he won't even need to hear counsel. Perhaps he can fill in the blank as you will. And then at that point it seems to me that we are in a much clearer position. We need not guess as to what the bankruptcy judge has decided on this. And that's basically what you are asking us to do.

You are asking us to construe the transcript in a certain way. It is not necessary. It could be handled very quickly and then, at that point, to the extent your papers still make sense they could be utilized by you. Perhaps you might be surprised, there might be a finding in another direction. But there is no need for us to speculate as whether the judge made a noncore or core finding. So I think that's the way to proceed here at least in the first instance.

MR. SURIANO: We would appreciate from the court either an order or direction –

THE COURT: You will get a direction to that effect.

MR. SURIANO: – requesting Judge Blackshear to make that specific determination.

THE COURT: Yes. Without prejudice to your proceeding in any manner you choose thereafter.

MR. SURIANO: Very well.

THE COURT: Does any party have any problem with that?

MS. STEWART: No, your Honor. I am Victoria Stewart and I represent Kalvin-Miller International, a broker defendant in this case. We did not submit a set of papers for your Honor for a number of reasons. Essentially we felt that the arguments raised by the movants in this case also were with respect to the defendant Kalvin-Miller.

THE COURT: And you adopt them?

MS. STEWART: We adopt them. If we are before your Honor again after a determination by Judge Blackshear I would like to know if your Honor would like a separate set of papers although we feel that the issues were clear.

THE COURT: There is no need for a separate set of papers that are simply repetitive of what had already been submitted. You can adopt the arguments of co-defendants just as easily.

MR. GINSBURG: I am Larry Ginsburg, representing Ben Cooper. Let me just put this a little bit more in a factual context for you.

THE COURT: What's wrong with the approach, at least to the extent that we are now faced with a situation in which whether this is a core or noncore proceeding it is a matter that should be resolved clearly and the bankruptcy court, in the first instance having heard this and having set through all of this, familiar with the case is in the best position to make that determination.

MR. GINSBURG: I don't disagree with that, your Honor. All I would like to point out is that this is a Chapter 11 debtor with a confirmed plan providing for a hundred percent payment to

creditors. The final payment is due at the end of June. The reason that this entire thing was brought on was because the plan is threatened by the threatened termination of the insurance ab initio and by the lack of the payment of this claim.

Justice Blackshear set an accelerated schedule for discovery. All that these procedural happenings are doing is delaying that discovery. We have a June 15 pretrial conference date before Judge Blackshear. It is my belief that not only doesn't the transcript of the May 17 proceedings implicitly hold that it was noncore, I believe there is no question in my mind that Judge Blackshear at least with respect to the insurance company, will hold that it is a core proceeding. It might be a different standard with respect to the other two defendants.

So I have no problem at all with going back to Judge Blackshear on that issue. But what I would like clear is that this court is not otherwise issuing any temporary restraining order or injunction and that the parties are free to comply with the discovery schedule.

THE COURT: I am not going to. I am sending it back to Judge Blackshear for his determination. I am not reaching any other decision in this case.

MR. SURIANO: Your Honor, may I be heard because I had understood the court somewhat differently?

THE COURT: No, please, you seem to be in the habit of implying rulings and implying findings. When you are before a judge and you want something expressly on the record then it should be on the record. You cannot imply from anything that I have said that I have granted any kind of temporary relief to you or any injunction, preliminary or otherwise.

If you want that, frankly, I don't see why it is necessary because right now I'm sending this back to Judge Blackshear for a decision as to whether it is core or noncore, which is fundamental to this issue.

MR. SURIANO: Your Honor, if I may. I am requesting a stay, and in my papers I did so request of this court that until this court determines whether or not the issues raised on our motion are meritorious, that a stay of that portion of Judge Blackshear's order which directed all of the defendants, but particularly the insurance company, to comply with discovery, be stayed.

THE COURT: What is the discovery compliance date currently?

MR. SURIANO: Judge Blackshear determined that by May 26, which was last Friday, the insurance company was to provide all insurance policies that it had issued in the United States for A, non-sprinklered buildings, and B, sprinklered buildings, covering manufacturing facilities throughout the United States.

You have before you, your Honor, the affidavit of Richard Wurtzberg, the claim manager of Star Associates which is one of the managing agents of the insurance company. This is a Herculean task. The reason I brought it on by order to show cause, your Honor, is that first of all, we ought to not have any of this discovery which, by the way, includes the deposition on an accelerated basis not only of the insurance company but of the co-defendants.

And what I mean by accelerated basis, we were supposed to have depositions this week and the beginning of the following week. If your Honor were to simply stay that provision of the order until Judge Blackshear determines whether or not it is core, then, whatever that decision is, we can make a determination whether or not we wish to appeal to your Honor.

There are eight separate requests for relief that I have made of this court, the first of which was a stay in whole or in part of the bankruptcy court order. If I can step back a bit. That order not only granted the debtor in possession accelerated discovery which I have outlined, it also stayed our state court action in New York County, and it prevented or enjoined us,

the insurance company, from effecting a notice of cancellation under the policy of insurance which we seek to hold void ab initio but which they seek to enforce.

THE COURT: How much of what you have appealed here is an appeal as a right?

MR. SURIANO: I believe, your Honor, and that's one of the alternative bases of relief that I am asking you to find in my order to show cause and moving papers, that it is a final order particularly since he put in the preliminary injunction against us, the insurance company.

What Judge Blackshear did in his order is he said, A, accelerated discovery, B, produce every single insurance policy in the United States issued by your client—and we have the transcript here C, you can't go proceed with the state court action, D, you are preliminarily enjoined from cancelling the policy. And he did something else which we asked him in our papers not to do.

There is a dispute, a factual dispute between what the debtor in possession claims the insurance policy to be and what we the insurance company say it to be. They think it is one document; I know it's another. A jury will decide.

But what Judge Blackshear did in his order is he adopted their, the debtor in possession's, version of the insurance policy. Let me tell you why that's critical, your Honor. Simply this. In the debtor's version of the insurance policy it is creating coverage for the very thing that I said we never knew about, we never intended, namely manufacturing.

Judge Blackshear's order, with all respect to him, has the effect of adopting what they claim to be, they being the debtor in possession claims to be the policy and now we are ensuring manufacturing.

THE COURT: As far as the plan of distribution is concerned, what are the dates?

MR. GINSBURG: The final payment is due the end of June.

MR. SURIANO: There is one other point that I have to bring to this court's attention. Nowhere in any of the many pieces of paper submitted by the debtor in possession to Judge Blackshear in connection with their reorganization plan, nowhere is it stated that the insurance proceeds relating to this alleged fire loss are necessary to pay the creditors.

What they are saying is this. The reorganization plan which was executed or adopted by Judge Blackshear on April 4, 1989, has a reference to it that says in essence, "and the debtor in possession shall maintain insurance."

THE COURT: Let me just ask the debtor something. How is this possibly going to resolve itself before the plan under whatever scenario one looks at, the state court, Federal court, core, noncore, before the final payment?

MR. GINSBURG: All the arguments that we are hearing now are exactly the reason why this should be before Judge Blackshear, who has peculiar knowledge of it, on an expedited basis. There are certain things that were said that I have to respond to because you don't have the full flavor.

The full flavor is that there are three defendants here. The debtor paid money, paid in full, for insurance coverage. It was always contemplated that they had an insurance coverage. They either have insurance coverage from the insurance company or they have it from the two brokers. Curiously, the insurance carrier for the malpractice on the brokers is the sister company to the insurance company. What we have here is a three-headed tiger who are all coordinating the stall game to keep this thing out of district court on a very slow track in state court and that's the game that's being played.

There is something in his file, your Honor, that will end this, I believe. He doesn't want to produce it. Judge Blackshear said to produce it. This court should not enter a stay.

THE COURT: Surely that's not fault of the policy also nationwide.

MR. GINSBURG: He is also misrepresenting what was discussed before Judge Blackshear on that issue. We made four tier requests for documents, three of which he is not objecting to. His underwriting file, his correspondence with his brokers. He is not objecting so let him produce those today. That was our informal arrangement after we saw your Honor.

On the policies, there is a provision of New York State Insurance Law, Section 3105, that says in order for a misrepresentation to be material it must be such that an insurance company would not have issued the policy had it known the true facts. And it specifically says in support of the insured making that case they are entitled to know what the policies are and know what the other policies are.

Before Judge Blackshear we made a request for all policies they have written on sewing machinery factories in Georgia, all policies written on sprinklered and non-sprinklered which is an issue in this case in Georgia and throughout the United States. Before Judge Blackshear we discussed the Herculean task. We acknowledged it. We said by the 26th give us a list, let us know whether you have written two policies, let us know whether you have written five policies, let you the get a start and make due efforts to do it. The order doesn't require himself it requires him to make all due efforts to produce what he can produce. This is just not a fair statement of what happened below.

THE COURT: If this case were remanded to Judge Blackshear he would be able to deal with this within a day, wouldn't he?

MR. GINSBURG: I believe so. One other thing needs correcting. As to the insurance company here, under the settled law of the State of New York there is absolutely no right to a jury trial. So as to the insurance company whether it is core or whether it is noncore, they are going to Judge Blackshear.

THE COURT: That can be decided. I've decided what I am going to do.

MR. HEINEMAN: If I can just be heard for one moment.

THE COURT: I guess you have some information.

MR. HEINEMAN: Geoffrey Heineman from Ohrenstein and Brown, and I represent Kerwick & Curran. The only thing I want to make clear, indeed if your Honor is going to remand it for that issue I have no problem with that. My only concern is we basically have just been brought into this case and my concern is just that, the June 30 deadline, the expedited discovery. Counsel for the insurance company and the debtor have been going through informal discovery since January since the January loss. We have not been a participant.

THE COURT: This is perfect matter for you to take up before Judge Blackshear at the time he rules whether it this is core or noncore. I am now directing that this case be remanded to Judge Blackshear sheer for an express finding as to whether this case is core or noncore. Matters of discovery are to be taken up before him, any arguments as to extensions will be listened to sympathetically by Judge Blackshear. I, however, will not stand in his shoes and try and second-guess him on that.

Your right to return to district court remains inviolate and in the meantime I will enter a stay of time, I will toll the time period that is required for discovery between now and the time Judge Blackshear rules. The stay will lift as of the moment he decides whether this is core or noncore. That's the decision.

MR. GINSBURG: Just procedurally, will this court issue that directive to Judge Blackshear—

THE COURT: It is on the record right now. It is a matter of court order. No further order is necessary. The matter can go before Judge Blackshear. Either party is free to bring it to Judge Blackshear's attention as to what the court has just ruled.

MR. GINSBURG: Will this file be transmitted to Judge Blackshear with the current briefs submitted to this court?

THE COURT: Certainly.

MR. HEINEMAN: We attempted to file originals of our cross-motion with the clerk office and they indicated they couldn't take it until it had a number.

THE COURT: We have a miscellaneous number because this is Part One.

(Concluded)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of

	Case No.
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO.,	88 B 10547
AIMWELL PRODUCTS, INC.	88 B 10546
BEN COOPER SALES, CORP.	88 B 10770

Debtors.

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June 15, 1989

United States Custom House
One Bowling Green
New York, New York 10004

s/c Debtor v. The Insurance Company of the State of Pa. – Pretrial Conference

M/M for Determination of Core v. Non-Core

B E F O R E:

HON. CORNELIUS BLACKSHEAR,

Bankruptcy Judge.

A P P E A R A N C E S:

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PROCEEDINGS

MR. SURIANO: I am not sure what the protocol is as to who goes first. I represent the Insurance Company of State of Pennsylvania.

You might recall that we were before you in the context of the Ben Cooper case relative to the adversary proceeding brought by Ben Cooper against the insurance company and the two brokers.

Your Honor made a ruling from the bench on or about the 17th of May which was reduced to an Order on or about the 24th of May.

There was then a motion practice — motions were made. I brought a motion on behalf of my clients before the Honorable Judge Walker in the District Court seeking various relief from Your Honor's ruling.

You might recall you blessed that, and I think I quote you correctly, that motion in the sense that you told us, go right ahead.

Judge Walker decided at oral argument from the bench that before he could, or should address any of the issues that were raised in our motion, that he ought to remand to yourself the specific question whether this case, with all its facts and circumstances is a core or noncore proceeding.

And while it was my view that we were going to have more motion practice, I question what has happened is, each of the sides have submitted some additional or supplemental memoranda to yourself, Judge, as well as the papers that were before Judge Walker.

And we are now here for, I suppose, the Court's argument relative to the core or noncore issue.

I don't know to what extent the Court has had an opportunity to review the voluminous papers.

THE COURT: I have reviewed them.

MR. SURIANO: With respect to the adversarial procedure, and it's our position on that, this case should, if it is to be heard in the Federal system should be heard by a District Court and not by Bankruptcy Court.

In the main our argument is, if there is jurisdiction, and setting that aside, then because it is –

THE COURT: I thought the last time that you were here we discussed the fact that the core and noncore, not being jurisdiction because of the fact that, if you are correct, what happens when bankruptcy case – because of the Marathon decision and because of the amendments to the Bankruptcy Code in 1984, what happens is that now the matters are – the bankruptcy cases are basically assigned to the District Court and the District Court then refers the matter to the Bankruptcy Court.

By an order of Judge Motley, or Judge Brient, whoever was Chief Judge, they referred enmasse all bankruptcy cases to the Bankruptcy Court here in the Southern District of New York.

There's not a question of jurisdiction. What the question should be and the parties should focus, and it's a two part question, you have to get over the hurdle of core.

If the case is a core matter, then I don't really need to go any further if I make that determination.

But if I decide it is a noncore matter, then we get to the case where Judge Sweet revoked the reference of Judge Buschman for the purpose of hearing the case because he felt it would be a waste of judicial time for him to have two injury trials on one case.

And in addressing that issue, we need to address the issue as to the rights of the jury trial, as to whether or not this is a legal

issue or equitable issue that this Court has to address this morning.

If you frame your argument within those issues, I think that we can get this case going as far as core versus noncore.

Quite honestly, you have a very difficult road to travel in convincing this Court that an issue such as the issue that is before me today is not a noncore matter.

Although all the parties are focused on one particular section under 157. I see this also as part of an administration of the case.

MR. SURIANO: Your Honor, I will focus in — or attempt to focus where the Court is directing me.

With all due respect, we think that, despite what you said, it doesn't belong in this Court, it's not a bankruptcy matter. We're not conceding that point.

THE COURT: I don't anticipate you conceding it. I was just attempting to tell you where my mind has been guided based on the papers that I have read and that have been supplied to me by the various parties.

MR. SURIANO: Briefly, Your Honor, we believe that this is a — the issue in this case deals with whether or not a contract of insurance was formed.

THE COURT: I think when you discuss that also, you need to address the issues that I find are relevant and that is the fact that the — when the contractors are prepetition or postpetition.

MR. SURIANO: I agree. There is no doubt and no dispute that the insurance contract, if it exists was formed postpetition.

This is a Debtor in Possession who retained two brokers, our co-Defendants sitting here, to procure various insurance policies, one of which was a binder, and there's a dispute as to what the policy is.

THE COURT: That is not really for the actual trial itself.

MR. SURIANO: We say the policy is one document and they say it's a combination of another document.

Setting that aside, the contract, if it exists, was formed after Ben Cooper was in bankruptcy in the reorganization context.

Now, it's our view that the law is that a Debtor in Possession who in the ordinary course of his business as a Debtor in Possession enters and negotiates into contracts, does not, by the very fact that he is a Debtor in Possession, have the right to go into the Bankruptcy Court to adjudicate any controversies that might arise as a result of that contract.

THE COURT: I am going to interrupt you. I want you to focus on the issues as I see them. I want you to address those issues.

That is notwithstanding the fact that within the Order that this Court signed, it reserved the right to review any controversy that may arise after confirmation.

MR. SURIANO: That is our position. The Court reserved to itself a particular right in language proposed by the Debtor and adopted by the Court and it's so ordered.

I have reviewed again the record, because I was not so sure on May 17th what I had said to you, whether it was correct.

And I now can tell you that I believe it is still correct.

Mainly that the only reference to insurance in the plan that was adopted, on May 4th, I think, '88, by this Court, is what I would call the catch all provision that the Debtor in Possession was to maintain insurance.

In other words, there is no — I think the Debtor has said this on the record — there is no statement to this Court that the proceeds of that insurance policy were necessary —

THE COURT: You are straying from the issues I am focusing on. I am not focusing at this point on whether or not the proceeds from an insurance policy is necessary for the plan.

What I am focusing upon is that within the plan itself, the plan of consummation that I signed, the Debtor reserved the right to come back to Bankruptcy Court to resolve any issues that may arise out of the fact that this case was confirmed.

MR. SURIANO: Our short answer to that is, we believe that that was inappropriate for the Debtor to have reserved that authority.

THE COURT: Why?

MR. SURIANO: The case law that we have cited to you stands for the proposition that is against public policy of having a Debtor in Possession go out and act in the normal course of its business in order to get out of bankruptcy.

THE COURT: The Debtor is not out of bankruptcy upon the plan of consummation. After plan of consummation, you have substantial consummation of the plan. And until you have substantial consummation of the plan, the case still remains a bankruptcy case, because if the plan is not consummated then the Bankruptcy Court must then rule whether or not the Debtor has the opportunity to resubmit an amended plan or – convert one under Chapter 7.

MR. SURIANO: We don't think that the Debtor can create something that it didn't have by statute.

The portions of the statute that you are quite rightly pointing out to us, I think, are not intended to deal with the public policy decisions that are in the case law to say, look, if a Debtor in Possession goes to Con Ed and orders electricity and the Debtor in Possession for some reason doesn't pay for that electricity, the Debtor in Possession does not have a right to dispute the obligation.

THE COURT: What if the Debtor paid -- suppose the Debtor paid Con Ed and Con Ed said they did not pay them. And Con Ed commenced to cut off the electricity of the Debtor.

Are you telling me the Debtor does not have the right to come back into the Bankruptcy Court.

MR. SURIANO: He has the right to go to the normal Courts that it would be required to do.

THE COURT: One step further, then, suppose that there was no disagreement between you and the Debtor as to the insurance plan, and suppose the Debtor instead of paying one lump payment were to pay, have paid one-third upon the binder and subsequent three months paid another one third and finally paid a final one-third.

Are you telling me that at that point you wouldn't have the right to come in and establish your claim as a claim that should have priority over other claims under 11 U.S.C. 503?

MR. SURIANO: We would first, as we did in this case, we started the action first, we went to the State Court and started an action against Ben Cooper, and we demanded certain relief.

THE COURT: And also I think we indicated at the last hearing that you may have technically been in violation of the automatic stay, is that not correct?

MR. SURIANO: I don't think so. Because --

THE COURT: The case is not then closed. If the case is not closed, the automatic stay still stands in effect, because 11 U.S.C., the automatic stay becomes effective upon the filing of the Petition and stays there until the closing of the case.

MR. SURIANO: Our decision to go to the State Court lays, or -- the fountainhead of that decision is our belief that when you have a Debtor in Possession it's a different kind of animal and that a Debtor in Possession just can't waltz into the Bankruptcy Court when it has a dispute on a normal contract, whether it exists or not.

THE COURT: Wait a minute. I think you have really expanded upon your theory now. You are telling me that preconsummation the Debtor could not do that?

MR. SURIANO: I am responding to your question, are we in technical violation. I don't think so.

THE COURT: That is not the issue.

MR. SURIANO: You stayed that anyway.

To go back to the main thrust of the argument, we think we shouldn't be here for the reasons that I have said.

Your Honor, if we're incorrect, then you have to decide, as Judge Walker has asked you to, whether it's core or noncore.

Now, there are a number of enumerated grounds in our briefs. And to that extent, I have joined the brief of co-Defendant KC insofar as that brief discusses what the Debtor in Possession believes to be the basis for core jurisdiction.

I am not going to go through each one.

We did that in the brief.

THE COURT: I think you should go through the one that you feel is the strongest.

MR. SURIANO: I don't think that he has asserted under any of the provisions that designate the types of core and noncore matters.

THE COURT: What about L, that is consummation of plans?

MR. SURIANO: The consummation – Going back to the same points that you raised originally, my answer is, we don't think –

THE COURT: You said he did not address it. I know I –

MR. SURIANO: He did address it. I misspoke if I said that. He raised it. I don't think there are meritorious grounds, but he did raise it.

And Mr. Heineman in his brief went through each of the elements and gave case law why he thinks, and I adopt – he being Mr. Heineman – I adopt, should not persuade you to make this a core proceeding.

I would like to talk a few seconds about the jury question. The first time that I appeared before you, I had no papers and I think the record will reflect I said, Your Honor, I believe this is going to be a jury case and that with all due respect it should be tried in the District Court.

You said, let's put some papers together and let's see.

A lot has passed since then. The seventh amendment right of my client to a jury trial is inviolate. And case law from Marathon on down stands for that proper position.

THE COURT: If he is entitled to a jury trial.

MR. SURIANO: Your Honor, my client is entitled.

THE COURT: I want you to address this issue, notwithstanding that I view what the Debtor is asking as equitable in nature as opposed to legal.

MR. SURIANO: With all due respect we disagree with that determination, if you finally made it.

THE COURT: Let me tell you how I reached that determination, so you can address it.

The Debtor is not asking, really, for you to give money at this point. What the Debtor is asking is that you honor a contract as they view the contract.

Now, if as a result of you honoring that contract, you then have the opportunity to come back and say that he was in

violation of that contract, then – right now the Debtor is saying that you have to honor the contract as they view it.

I am not going to get into the issues as to the differences of opinion. But what he is saying is that not at this point you owe me money, because if there is no contract, we never get to the monies issues.

So, therefore, that to me is equitable in nature as opposed to legal in nature. Because he is asking you, he is basically asking for a sort of a reverse injunction.

MR. SURIANO: I think that you have to look, sitting at Bankruptcy Court, Judge, have to look to what New York State law would do. And it's clear, despite the misstated –

THE COURT: New York State law? Where was the contract entered into, it says New York State law.

MR. SURIANO: In determining – yes, on the contract question, yes.

THE COURT: Which contract?

MR. SURIANO: Whether or not there is a contract.

This Debtor in Possession is asking for money damages. He has three, four causes of action in his adversary Complaint.

THE COURT: But I ask you this question, once I make the determination as to whether or not there's a contract, and which contract is in force, doesn't the money damages sort of flow from that?

MR. SURIANO: No, two reasons. A step back, Judge. The first reason, it's been decided in the Southern District, Pied Piper, Bluepoint.

Specifically and, in fact, in Pied Piper it was my same client, that we have a right in the jury trial in an jury context.

THE COURT: More specific as to Pied Piper, I have had an opportunity to look at that case also.

Was that the same issue that is the issue here today?

MR. SURIANO: There were several issues.

THE COURT: Were any of the –

MR. SURIANO: Were –

THE COURT: Not noncore or core, were any of the issues as to whether or not a contract existed, and if it existed, which contract existed because of your contention of if there's a contract, this is the contract, and the Debtor is stating, that is not the contract they entered into?

MR. SURIANO: I will respond to the second part first, the Debtor is seeking in excess of $2 million damages. And that is in their Complaint.

THE COURT: Let's deal first with whether or not the issues that I – as I view them, that are the heart of this particular case, as to whether or not those were the issues in the Pied Piper case.

MR. SURIANO: I think that at the end of the day our conclusion is that they are inextricably so intertwined that the Court has said in this kind of case you have absolutely a right to a jury trial.

THE COURT: You can go back now – I am sorry I had to do this, but if this is a core matter and you have the right to the jury trial, how is this the same as Pied Piper?

Because in Pied Piper I think it was considered to be a noncore matter and as a noncore matter, the reason that Judge Sweet revoked the reference was because he felt that it would have been a waste of judicial economy to have two trials, because as we know the Judge, in a noncore matter, the District Court, must review the matter de novo.

If that is the case, would you explain to me how, in making the determination today that this is a core matter, how do we have the same factual situation as you had in the Pied Piper case?

MR. SURIANO: I think it will be slightly different. I have not –

THE COURT: Would we have a waste of judicial economy?

MR. SURIANO: Yes.

THE COURT: If it's a core matter, it goes on appeal, it's not reviewed de novo. That is why I focused on core, noncore, not being jurisdictional, but how it gets to the next level.

MR. SURIANO: I think the answer is, it's my sincere belief, that a Bankruptcy Judge not being a full Article 3 Judge with the full powers of an Article 3, in view of cases like Pied Piper –

THE COURT: Can I have a jury trial –

MR. SURIANO: (Continuing) – should not in this case – I won't make sweeping statements to the Court, in this case – should not have, if you determine it's core, you should still send it to the District Court.

THE COURT: Why?

MR. SURIANO: In an insurance context or a context of a regular lateral contract obligation of Debtor in Possession it's outside of the scope of what a Bankruptcy Court Judge should do.

THE COURT: Notwithstanding Section 364, 5, which deals with executory contracts that this Court deals with on a regular basis within a bankruptcy context?

Because there this Court has to determine whether or not there's an executory contract, Section 365, whether or not the Debtor has a right to assume or assign that executory contract or to reject that executory contract, notwithstanding that you feel that this Court should not deal with an insurance contract?

What makes that more unique than a labor contract, for example?

MR. SURIANO: I understand the Court's distinction. I think what you're asking me to do is to say what, if you determine that it is core, what our remedies could be after that.

THE COURT: No, I am not asking you that. What I am asking you is, if I determine it is core, why is it that this case should be considered in the same vein as the Pied Piper case, because the only reason Judge Sweet decided to revoke the reference is because of judicial economy, I think.

And I want to know what would be the judicial economy, because if I decide it's core, then you have a right to appeal.

If it's noncore, it must be reviewed de novo. And there is where you have the judicial economy issue, because by rights you have a right to review de novo.

And so, therefore, if I decide that it's core, I think that this Court can have a jury trial, because Bankruptcy Courts have conducted jury trials before, what would be the difference in us having the issue decided here as opposed to the District Court?

MR. SURIANO: I go back to my position that I just believe, and we will look again to see if there is any decided case law on this, I don't think that there really is, that it's simply not within the Bankruptcy — it's not what the Bankruptcy Court was intended to do for this type of case.

THE COURT: And it's a novel one. This case is novel?

MR. SURIANO: Yes.

THE COURT: Why?

MR. SURIANO: I am following up on your assumption that you are going to rule that it's core, and I am urging you that it's not core, but —

THE COURT: Change my mind.

MR. SURIANO: I will address changing your mind in a second. If you want me to answer what I think on the – if you decide it's core, yes, I think you are right, we do have a right to appeal, and we might or might not do that.

I think – the cases talk about the District Court not exactly on points, but in analogous cases the District Court being better equipped and jurisdictionally more appropriate to have this controversy reviewed.

THE COURT: Would you –

MR. SURIANO: One additional point.

THE COURT: I want you to explain to me two terms that you used. You said, I think, that they were better equipped, and what was the other matter that you raised?

MR. SURIANO: It's just not what the Bankruptcy –

THE COURT: Right, what the Bankruptcy Court should be doing.

MR. SURIANO: Right.

THE COURT: And what was your third?

MR. SURIANO: The other point simply went to, going back to earlier points, that other Bankruptcy Courts, Judge Celia Gertz in Bluepoint, when she was confronted with a very, very similar question in a reorganization plan, she said that even if it were a rereorganization plan, she would remand it to the District Court, because it –

THE COURT: She could not remand it to the –

MR. SURIANO: By her own motion she would refer it to the District Court.

THE COURT: And do you remember what happened in that case when she did refer it?

MR. SURIANO: Yes.

THE COURT: What happened?

MR. SURIANO: It was settled.

THE COURT: I was very interested in seeing what the District Court's reaction would be if a Bankruptcy Court referred a case to it.

MR. SURIANO: I think that it accepted the reference, or the revocation of the reference.

THE COURT: She cannot revoke –

MR. SURIANO: Yes, but just so I get my terminology correct.

THE COURT: She sort of referred it. She has not authority –

MR. SURIANO: Only the District Court can revoke the reference?

THE COURT: Right.

MR. SURIANO: It's my belief from reviewing the settlement papers that the next step in that case, because I also obtained their file, that the next step was that the Court accepted, and there was some pretrial thing that went on, and the case settled.

THE COURT: Pretrial conference hearing. It would probably be very interesting for this case to have been involved, or had a record of that conference as to the issues that must – it must have been a very interesting conference.

MR. SURIANO: I can't represent that that issue arose.

THE COURT: I am quite sure it did.

Continue.

MR. SURIANO: Your Honor, I think that going back to the jury —

THE COURT: Before we go back, now that you have finished your third point, let's deal with the fact that the Bankruptcy Court is not equipped, and why would you think that in this particular case, especially since the Bankruptcy Court deals with contracts on a regular basis when it is asked to have the contract assumed and assigned, or to be rejected, such as one of the matters that calls the amendment to the '86 Code and there was a union contract.

There's a contract that you need. There's a contract that has two Federal statute Orders.

In fact, there was a case, if I remember correctly, that came down in the slip opinions as to the jurisdiction of the Bankruptcy Court as opposed to the jurisdiction of the Federal labor reorganization.

So now I want to know why this contract is so unique and has those kind of issues that a Bankruptcy Court is not equipped to deal with it?

MR. SURIANO: Intellectually the Court is equipped.

THE COURT: I am quite sure you didn't mean that when you —

MR. SURIANO: I just want to make that clear. It is equipped to deal with those issues.

THE COURT: Do you think that you could get a case heard quicker in District Court then you can in the Bankruptcy Court, notwithstanding that the first priority must be criminal cases?

MR. SURIANO: I am not sure what the speed relative of the District Court versus the Bankruptcy Court is. I don't have statistics in front of me.

My guess is that the Bankruptcy Court are a bit speedier in resolving issues then the District Court. But speed not the only issue.

It's whether or not the Court hearing has the – I am going to use a word that has – has the jurisdiction or the authority, to hear the matter.

So speed is one of the factors that goes into a Court's mind in deciding whether or not to accept or reject the matter of a particular matter.

THE COURT: Wasn't it the philosophy, or wasn't it what was meant under the Code for Bankruptcy Courts to hear these matters, would you mind expounding on that?

MR. SURIANO: Yes. But where I got the notion that, if you will, that Bankruptcy Courts are not equipped, it's in one of the cases that was cited to you where I believe there was a Long Island – out in Hauppauge, the Bankruptcy Court, in a very recent opinion said among other things in referring a matter back–

THE COURT: Not – referring it to the District Court?

MR. SURIANO: Yes. – it's just not equipped to handle it. And I am reciting it. It's referred to in the Acolyte case.

THE COURT: That was an insurance contract type case?

MR. SURIANO: No, I don't think so.

THE COURT: What type of case was that?

MR. SURIANO: I will have to tell you by referring to my brief, and I will be happy to supply that information to you.

THE COURT: Is it in your brief?

MR. SURIANO: The reference is to the case that cites that case. I believe it's the Acolyte case.

THE COURT: Could you give me a factual specimen that I can compare to this case?

MR. SURIANO: Not –

THE COURT: I have a type of case – the type of issue that the Bankruptcy Court thought it wasn't equipped – felt it wasn't equipped to handle.

MR. SURIANO: The one I am referring to is cited by Judge Holland in the Acolyte case. I am not saying it's the Acolyte case that said it wasn't equipped.

Acolyte dealt with a Debtor's action to collect for services rendered pre Chapter 11 filing.

THE COURT: You mean an account receivable?

MR. SURIANO: Yes.

THE COURT: And the Judge in that case said that the Bankruptcy Court was not equipped to handle that type of an issue?

MR. SURIANO: No. To be precise, the reference that I am making to the non – to a Bankruptcy Court Judge, and it's a failure–

THE COURT: This is a Bankruptcy Court?

MR. SURIANO: It's a failure of my memory to give you cite of the Court that said that. It's my belief that that is discussed in the Acolyte case.

THE COURT: Let's go to the other issue, and that is what the Bankruptcy Court was established to do.

I may be paraphrasing, but that is the sense I got out of your statement, that I should not hear this matter, because that is not what Bankruptcy Courts are to be doing in dealing with bankruptcy issues.

And I would like to know what basis you make that statement on?

MR. SURIANO: I go back to the argument that I raised earlier. It's all in our papers that public policy is –

THE COURT: Which public policy is this?

MR. SURIANO: Of a Debtor in Possession not being in – should not be able to come in –

THE COURT: Long after the case has been confirmed, is that your statement?

MR. SURIANO: Well –

THE COURT: Or immediately after the case has been confirmed, or that the Bankruptcy Court should not contain jurisdiction to hear disputes arising out of consummation or out of the bankruptcy case?

MR. SURIANO: In this case, I think our position is that this Debtor should not be permitted to come into the Bankruptcy Court to – and this is our view, drag in disputes that are outside of the purview of the bankruptcy.

THE COURT: Therefore, it's up to me to make a determination as to whether or not this dispute is within the purview of the Bankruptcy Court.

MR. SURIANO: That is one of the things –

THE COURT: If I decide that it is within, you are saying, then, that argument doesn't stand.

But if I decide it's without, then you are correct. I have to have an option here now, that I – because you are saying that it is not within the purview.

My other side says that it is. So your argument when you make the statement as to whether or not this is an issue that was meant

for Bankruptcy Courts to review, that you are saying that I shouldn't be reviewing it because it is not within the purview of the bankruptcy case, and that is the public policy.

MR. SURIANO: Yes, and I am citing the case law –

THE COURT: I agree with that statement. I think that if I make a determination that it is not within the purview of the bankruptcy case, then you are absolutely right, that the Bankruptcy Court should not be using its jurisdiction, although I don't like to use that term, because it's confusing in this case, should not be reaching out and bringing cases into the Bankruptcy Court that rightfully belong in other Courts.

And I agree with that position one hundred percent.

Continue.

MR. SURIANO: I want to touch on the jury question. I don't think that we resolved one of the questions that you posed to me. If we did, stop me.

I think, Judge, that you have to decide whether you believe we're entitled to a jury trial.

I have cited a complete thorough list of cases that are going to assist you in reaching that decision.

You raised the points, if I may paraphrase the Court, what –

THE COURT: If you paraphrase too far off, I will correct you.

MR. SURIANO: What if it's a Complaint that has equitable and nonequitable causes of action?

THE COURT: Let me see if I can sort of send you down a path that you will address the issues in some – in a logical manner.

If I decide it's a core matter – I will agree – let me tell you where I will agree with you.

I think Pied Piper is right in the sense that it is a noncore matter. I also believe in judicial economy. And if I decide it's a noncore matter, we don't need to reach the other issues because it's going to be withdrawn because of the Pied Piper case and Judge Walker will agree with that, I think.

However, if I decide it's a core matter, the first issue that we have to address is the fact as to whether or not you have a right to a jury – the first issue – is I think it makes having a jury trial irrelevant, in the sense that once I decide it's core, is that this Court will conduct the jury trial.

But if you are saying, well, maybe there's a question as to whether or not this Court can conduct a jury trial, then we get to the next issue as to whether or not you have a right to a jury trial.

So if you address it in those stages, fine.

MR. SURIANO: I think if you decide it's core, there is a very serious question in my clients' minds whether or not even if you – if this Court believes that a jury trial – that it can conduct a jury trial, whether that is a correct expression on these facts.

THE COURT: Let me see if I cannot focus you on a more practical vein. If I decide it's core, you are going to – still going before Judge Walker.

He will have an opportunity to decide whether I was correct whether it's core or not.

Then what will happen, if he decides that I was correct that it was core, he is going to more than likely send it back here, notwithstanding the fact that you think maybe this Court can or cannot conduct a jury trial. If I am incorrect, then it's all for naught, because if I am incorrect as to the core versus noncore, then he is going to revoke the reference.

Then I am saying why are those issues important. More important is the issue of whether it's core or noncore. I don't think

the jury trial has that much of a weight in my determination as to core or noncore. That only happens after I made the determination of whether it's core or noncore.

MR. SURIANO: I just disagree with you.

THE COURT: It's your right to disagree.

MR. SURIANO: With all due respect –

THE COURT: Do you understand what I am saying?

MR. SURIANO: I understand your line of reasoning.

THE COURT: Once I make the determination of core or noncore, you still have to go before Judge Walker, because he said he remanded it, he didn't overrule me. You still have to go before him.

Once you are before him, he is going to make determination as to whether it's core or noncore. And nowhere do you find in 157 any reference to core or noncore as to jury trials.

MR. SURIANO: Why do we have to reach that now as to what is going to happen at the next step?

THE COURT: That saves us – the same reason Judge Sweet in the Pied Piper reached it in judicial time.

We don't need to deal with that issue today, because it is not something that goes into the formula of core versus noncore. Jury trial is not an issue of core versus noncore. It becomes an issue only after noncore.

As Judge Sweet reasoned in the Pied Piper case, I think if that had been determined to be a core matter, then I don't think that Judge Sweet would have ruled the same way because there would not be a judicial economy issue then.

MR. SURIANO: Going back to our position which is, there's a serious doubt in our mind as to whether should Your Honor

determine that this is a core matter, and should Your Honor also then determine that you would conduct a jury trial, that under the facts of this case, you could do it.

I wish I could cite a case one way or the other that would say you can or can't. I can't do that.

I am arguing intellectually with the Court based on expressed opinions of other Judges and what I think, certainly what our position is.

I don't think it appropriate to discuss the other branches of the relief that I have suggested. We have discovery dispute, we have the stay issue.

Because I think you are focusing on the core or noncore. And things will naturally flow or emanate from that decision. And rather than take up time discussing those, I am going only to reserve my right to address them if the other side brings it up.

I am asking that the Court determine that this is a noncore proceeding and that if at all should be heard by the District Court.

THE COURT: Very well. Anyone else?

MR. HEINEMAN: I am Geoffrey Heineman. I represent Kerwick & Curran. I think that we have submitted a brief which addresses the reasons why we believe, especially as to our clients, where there are negligence claims and as to our clients where we don't believe the claims arise, unless Your Honor makes a finding that there is no insurance policy, that the matter is really a noncore proceeding as to us.

THE COURT: If I determine it's a noncore matter?

MR. HEINEMAN: Well, we believe it's an noncore matter.

THE COURT: I know that.

MR. HEINEMAN: If your Honor makes a determination that the insurance policy is in effect, then it really isn't a claim as to us.

THE COURT: That only comes after I may make a determination.

MR. HEINEMAN: The claims as to us, we believe, really are noncore. They don't seek relief as to us under specific provisions of the Bankruptcy Act. It's an negligence claim.

THE COURT: You are not telling me that in order for a Debtor in Possession or Trustee to bring suit against a party it must be a specific provision of the Bankruptcy Court?

MR. HEINEMAN: No. The relief that they seek which is money damages, which is all they can get from an insurance broker, he can't give them insurance, it's not equitable, only legal relief. I am saying that wouldn't fall within the definitions of the core proceeding.

THE COURT: Why not? If you had entered into a Contract of Sale, let's say, the Debtor was selling you property under the Bankruptcy Code preconsummation and you put down ten percent of the purchase price and didn't consummate the deal, are you telling me that is an issue that a Bankruptcy Court could not hear?

MR. HEINEMAN: I am not.

THE COURT: That is all they would be seeking, that would be money damages.

MR. HEINEMAN: In this particular instance there is no contract claim against my clients. It's solely for negligence, the claim against my clients. And a negligence claim —

THE COURT: Let me reverse it then, if the Debtor didn't perform some services that he was obligated to do to your client

in the Bankruptcy Court, are you telling me that you have the absolute right, notwithstanding the automatic stay, to go outside to another form to raise that issue?

THE COURT: In the context of a contract or just –

THE COURT: A negligence claim; let's say, you slipped on the Debtor's property and broke your leg.

MR. HEINEMAN: In that instance we would be seeking relief against the Debtor, specifically assets of the estate, that would fall within the definition of the core proceeding.

THE COURT: What if the Debtor slipped on your property?

MR.HEINEMAN: First of all, I believe there's an exception in personal injury.

THE COURT: Except in personal injury against the Debtor prepetition if you are talking about those cases that the Congress addressed because of the Johns-Manville case.

MR. HEINEMAN: If the Debtor slipped and has a personal injury claim against a third party, no, I don't believe that would fall within a core proceeding.

They would then be characterizing a straight State law claim, negligence claim, bringing that within the jurisdiction of the Bankruptcy –

THE COURT: You mean State Court claims cannot be brought within the jurisdiction of the Bankruptcy Court?

MR. HEINEMAN: I am not saying that. In Marathon, the Court addressed the issue –

THE COURT: But there's been legislation since Marathon in 1984 when the Bankruptcy Court was amended.

So, therefore it addressed the Marathon issued and codified Marathon through sections 28 U.S.C. 157 as well as 28 U.S.C. 1334 which deals with jurisdiction. That is why I keep addressing you, Mr. Suriano, 1334 is the jurisdiction of core versus noncore.

As I read 1334 it has concurrent jurisdiction.

MR. HEINEMAN: I am not disputing whether the Court has jurisdiction. I don't believe a negligence action by a third party falls within a core proceeding.

I believe it's within the definition of a noncore related to the proceeding, because it's –

THE COURT: Even though if affects the administration of the case?

MR. HEINIMAN: I don't think within the definition of a core proceeding you can bring within it, just because a matter has to affect administration or will bring assets in – the cases that we cited in our brief indicate that is not a sufficient reason to find a core proceeding. That is what I am saying.

MS. STEWART: We have not submitted papers before this Court. We did not submit papers before Judge Walker. When we were before Judge Walker, I indicated that I adopted the arguments made by the movants on behalf of my client, Calvin Miller, who is a broker in this action.

Today before Your Honor I would like to adopt the arguments created by Mr. Suriano and Mr. Heineman.

MR. GINSBURG: I am Lawrence Ginsburg. I am appearing on behalf of the Debtor.

I believe the oral argument this morning coupled with the papers submitted clearly set forth the argument made by the Debtor that whether or not a matter is a core proceeding is not in and of itself determined by the nature of the claim, but determined by the effect of the claim on the administration of the estate.

The cases cited by the Debtor make it very clear that included within the other subcategory as to the consummation of a plan, are the instances where the effective dispute affects the consummation of the plan.

In a case like this where the consummation of the plan scheduled to be concluded this month is directly threatened, that cries out for an application of the consummation subsection.

There is no real question, Your Honor, and I don't believe any cases have been cited, that hold for the proposition that this claim and this dispute is not a core proceeding, and that this claim and this dispute are disputes specifically retained by this Court under its broad base jurisdiction.

The cases cited in our brief, including Lumbard Wall clearly hold for the proposition that this Court's jurisdiction is not restrained and not limited. That if this Court believes that a claim is inextricably intertwined with the administration or consummation of a plan, this Court should keep that claim.

I believe that there is just no case law cited by the Defendants who at least have dropped the charade, and are now in the same boat that stand for contemporary proposition.

I take exception to one conclusion, in the event that this Court determines that this is a core proceeding and I believe the Court should so determine, there is no longer a question as to whether or not a jury trial is necessary, because clearly this Court can try a jury trial even if one is — it would be a procedural matter down the road in a Court proceeding for this Court to determine whether there is a right to a jury trial, and the distinction is drawn between the Defendants, as to whether it's a core or not core issue.

There's one distinction drawn between the Defendants, though, and that is if the Court were to determine this to be a noncore issue, and if the broker Defendants were entitled to a jury trial, then under Pied Piper this Court could not try the case.

However, even if this were to be determined to be a noncore issue, the laws of the State of New York are absolutely clear, the Phoenix Mutual case squarely holds for the proposition that an insurance company's claim sounding in the decision of a policy is equitable in nature.

Let's not lose cite of the fact that this game starts when the insurance company jumped into State Court and brought a declaratory judgment action for rescission of the insurance contract. Clearly, that is an equitable claim. And the Baker and Getty case cited by the Debtor supports the Court's reasoning even if money damages are incidental to a – that does not deprive this Court of the right to a nonjury trial, an equitable nature of the proceeding.

One final word, this matter started on May 8th. There's been no discovery to date. The time for confirmation is rapidly approaching.

THE COURT: You mean consummation.

MR. GINSBURG: Right. None of the Defendants raise any objections to three of the four discovery requests propounded by the Debtor. We'd like to those documents produced immediately. We'd like the insurance company to produce its underwriting file.

THE COURT: Judge Walker –

MR. GINSBURG: Judge Walker said as soon as this Court makes a determination of core or noncore, this Court will determine on how discovery should proceed.

THE COURT: Very well. Therefore you are not saying that they're in default, or that they have not been cooperating with the Debtor, because I read Judge Walker's –

MR. GINSBURG: There's a stay in effect until this Court makes a determination core/noncore. I am saying as a companion to that determination we would ask for discovery to proceed forthwith.

THE COURT: You can reserve your rights if he raises discovery issues.

MR. SURIANO: The Court understands where we're going. If the Court is going to determine today –

THE COURT: The Court will –

MR. SURIANO: – the core/noncore issue. Can I reserve until we have a decision from the Court as to whether we're going to address discovery or other relief.

THE COURT: Very well. Based upon the papers that this Court has read as well as the oral arguments, I think most parties can understand how I came to the Bench this morning. I have not been convinced otherwise.

This Court's mind is still such that this is a core matter. It's core because of the following reasons, under 157(b)(2)(a), that this is a matter that is inextricably intertwined with the administration of the case. And it is because it was an issue that it was a provision under the plan that this case, under which this case was confirmed, that this was going to be a situation where the Debtor was going to maintain insurance on the property.

Furthermore, it deals somewhat, not quite as strong, with 157(b)(2)(1), the reason it doesn't, this Court expressly within the plan of consummation, retained jurisdiction, because of disputes such as this dispute. And that is a phrase that is normally put in the bankruptcy plan of consummaton, this Court is shocked when it is not, it's normally put in, so the Court can go on to substantive consummation and then thereby closing the case, which refers back to the administration of the case.

We do not need these cases lingering. And it's been the history of this Court, that the Court best equipped to handle these issues in an expedited basis is the Court that confirmed the case, that is familiar with the facts and backgrounds of the case, so that time can move on quickly to resolve the issue.

So for this reason, this Court finds that this is a core matter, it is a core matter for the reasons stated, and that other issues can await the District Court's determination as to whether or not it may wish to withdraw the reference, notwithstanding the fact that this Court has determined that it is a core matter.

Now let's talk about discovery, because notwithstanding whether or not the District Court may wish to withdraw the reference, it seems to me that discovery would have to be done in either Court, because I think the options are now this Court or the District Court.

If that is the case, the parties should move quickly with discovery, because this is a matter that possibly affects subsequent consummation. And that being the case, this Court does not wish to see this case come back, as I indicated before, to this Court for a possible consummation, which inures to the detriment of the creditor who voted for this plan, it inures to the detriment of the Debtor and the workers of the Debtor, as well as the tax authorities that enjoy taxes being paid by this Debtor. That is the philosophy of bankruptcy.

It's to get the Debtor back into the main stream of commerce, so that all of those issues can be addressed in an expedited manner. So, therefore, we need now to discuss discovery.

MR. SURIANO: I –

THE COURT: Do you have a copy of the Order that the Debtor supplied to me?

MR. GINSBURG: There was a proposed Order to this Court.

THE COURT: Did you receive a copy of that?

MR. SURIANO: I am not sure which you are referring to.

THE COURT: Give him a copy and supply all the parties with the copy so we can discuss the Order as far as discovery is concerned.

MR. GINSBURG: I have only copy. It was delivered by hand to –

THE COURT: You have just one copy? I have the original here.

MR. GINSBURG: I just have a copy.

MR. SURIANO: Before we get to that, may I make an application?

THE COURT: Certainly.

MR. SURIANO: I have to think a little about what the Court has ruled.

However, I would request and we went through this the last time, that you stay your decision, make effective your decision to such time as we go back to the District Court until we have a resolution of the remaining –

THE COURT: There is no reason for my decision to be stayed. Whether I had ruled today whether it was core or noncore, Judge Walker, his specific instruction was as soon as I made that determination, discovery was to go forward.

I understand that because once I make that determination, then all he has to do is make a decision as to whether or not he is going to revoke the reference.

Once he makes that decision, No matter which decision he may make, discovery will have to be had. So I don't see any need for staying discovery, quite honestly, because one way or the other, discovery will be had in either the District Court or this Court.

MR. SURIANO: There is one other alternative, I agree with what you are saying, I think you have the discretion as a general proposition, and even with whatever Judge Walker said from the Bench to stay or not stay discovery if you want to, and I understand that you don't want to.

THE COURT: I have an open mind. If you can convince me as to the need of –

MR. SURIANO: It could be the other alternative is that the insurance companies right, and we wind up in State Court where we started this action a while ago, if –

THE COURT: You mean you are going to make a motion to that effect?

MR. SURIANO: That is part of the relief.

THE COURT: If you are in State Court, you still have to have discovery.

MR. SURIANO: But it's different.

THE COURT: I understand there are some differences. But basic discovery is basic discovery in State or Federal Court.

MR. SURIANO: I am asking for a stay. If I can not get a stay, as I am not getting one – am I correct? I get the message. In that event, I think – I don't know – I don't remember what the proposed Order said –

MR. GINSBURG: I found another copy of the Order.

MR. SURIANO: Maybe we can share it.

MR. GINSBURG: Here (handing).

THE COURT: A problem with these dates.

MR. GINSBURG: This Order was submitted on June 1st as a proposed Order. I didn't know we had been so delayed coming back to this Court.

THE COURT: You still have a problem with those dates.

MR. GINSBURG: We don't want the documents before the depositions go forward.

THE COURT: Especially with the date of June 14th.

MR. GINSBURG: Perhaps the Court has a problem with the date of June 8th.

THE COURT: Yes. Since we all know I am not going to stay discovery, let's get some realistic dates to be filled in in these Orders.

MR. SURIANO: The date is one factor, the other is the scope of the document demand, which I would like to raise with you.

THE COURT: Do the dates first. Starting in the second paragraph of the Order on Page 2. Those are the dates of June 14th, 16th –

MR. GINSBURG: If I may suggest, we do the dates for the document production first.

THE COURT: Fine. Counsel, how long would it take to produce – first, let's do the scope then, because that is how we're going to be able to determine how long it will take.

MR. SURIANO: We submitted an Affidavit, Judge, from the insurance company, from Richard Wertzberg, claims manager for Star.

And it's in the papers that we submitted to Judge Walker. Here's our problem: We don't have – I will tell you what we don't object to and what is not a problem, we can produce our underwriting file subject to the usual privilege and all of the rules of the Federal Rules of Civil Procedure, that is not a problem.

We can produce whatever correspondence there was between ourselves and Co-Defendant, which I think covers three of the four categories. And I think that is what Mr. Ginsburg was saying before. Our concern goes to the request by the Debtor and to review all insurance policies in the United States covering sprinkler and nonsprinkler buildings.

THE COURT: You are telling me you don't have it categorized?

MR. SURIANO: Right. We have gone and looked and found some, but it's too broad, Judge.

THE COURT: If you found some, can you not produce those some?

MR. SURIANO: Yes.

THE COURT: You have no problem with what you found?

MR. SURIANO: Our problem is a human one. Although people think insurance companies are monoliths, they are not. They function with people too. And we have an insurance company that has a number of managing agents throughout the United States.

Now Mr. Ginsburg on the record when we were before you limited his document request to policies.

There are other types of requests that were originally made, so those are moot. I am just saying policies.

We have looked through our New York office and what was issued. Now I am setting aside the question of territorial relevance, I am talking about compliance.

We objected and I take it you are not going to reverse yourself, the question is compliance. It's physically impossible for us to go around the country and dig these things out, we don't keep it that way.

There is a log which we produced a copy of it which we can do certain things. It's not computer generated, it's basically human memory. They are perfectly entitled to make inquiry at the deposition on this branch, which I think is irrelevant, and —

THE COURT: He has a right to conduct his case as he sees fit.

MR. SURIANO: Let us produce what we've been able to find from our New York office, which I believe is the bulk, but there are other offices yet in the United States, and let that be a starting point. And if he feels he has to make more inquiry, let him supply another document request after the deposition more narrowly focused and we can proceed from there.

THE COURT: That is reasonable.

MR. GINSBURG: We're harking back again to insurance law 3105 which defines a material representation as a misrepresentation.

THE COURT: What has this to do with discovery? He indicated impossibility. And what he has offered is to take what I have and depose the people — let's face it, unfortunately, this issue is not going to be resolved for your drop dead date.

You are going to have to work, and counsel is going to have to work with the bankruptcy counsel, they are going to have to explain — I am not going to put them under that kind of pressure. Let's deal with what he is offering.

MR. GINSBURG: To clarify a previous statement he had me making, I believe the discussion on the record was that if he could not produce the physical documents, the policies which I was less interested in, what I am primarily interested in is any written criteria that would determine whether he binds these types of policies, any rejection of an application because it was a warehouse in Georgia, those types of things.

THE COURT: What he is saying is that type of information is not readily available. And he is not a surgeon, he can give you what he deems is available.

We don't have to believe him, now. We can ask the people that you are going to depose that question and they can come up with that type of information

MR. GINSBURG: If the benefit of proceeding in that manner is that we get everything else expeditiously then I accept the Court's suggestion. And while reserving our rights to disclose procedure on that score, I will proceed that way.

THE COURT: How long will it take that information to be produced, that you say you have?

MR. SURIANO: What we have accumulated by the time that the stay was put in by Judge Walker, we can produce that within two days.

I just want to make sure that the Court understands that we reserve our right to come back and litigate this issue before you, if this case is here, at the appropriate time.

THE COURT: Absolutely. Let me explain to you my policy as far as discovery is concerned.

I would like to see it move forward quickly. Also I would like to have the parties resolve as many issues among themselves as they possibly can.

However, if the parties cannot resolve those issues, they are to contact my chambers and contact my law clerk and have my law clerk schedule the date within twenty-four to forty-eight hours and we'll have a chambers conference and resolve the issues and keep the case moving.

The date you are to produce these documents will be June 20th.

After you have received the documents, how long do you think it's going to take you to review those documents so that you can conduct a meaningful deposition, Mr. Ginsburg?

MR. GINSBURG: Because of certain pre-existing obligations, I would like to schedule the first deposition of the insurance company the following Monday.

MR. HEINEMAN: Since we're going to be asking questions of the insurance company as well, I would like the opportunity to have a little more than six days to go through documents, since I will be wanting to speak with my clients. And I don't know the size of what is going to be produced. I ask the deposition be the latter part of that week or the following week.

MR. SURIANO: I join in that. I suspended depositions in Philadelphia that are ongoing day-to-day to appear before you. I have to get the Metliner to go back. And I am continuing depositions until next Thursday – until the Monday following, I am sorry. That would be the 26th.

I have not yet spoken – my client will be available for deposition, we will make him available. I would like to do it in terms of the deposition either the last part of that week or the following week.

THE COURT: We're talking about the last week in June, then?

MR. GINSBURG: I would like to get one in before the June 30th date.

MS. STEWART: My vacation starts on the 29th.

THE COURT: How about the 27th or 28th?

MR. SURIANO: 28th, June 28th for the insurance company of the State of Pennsylvania.

THE COURT: Right.

Calvin Miller?

MS. STEWART: I am vacation. If we can do it after that period. I am the only one familiar with the case at that point. July 10th, the following Monday, I will make my client available.

THE COURT: July 10th, Calvin Miller.

Kerwick & Curran?

MR. HEINEMAN: We can make our client availability on Wednesday the 12th or 13th.

THE COURT: What date?

MR. GINSBURG: 13th is fine.

MR. SURIANO: The Debtor?

THE COURT: Centainly. Let's pen him in. We will add that as Paragraph 4 of that second –

MR. GINSBURG: Let's make the Debtor July 18th, the following Tuesday.

THE COURT: Very well. July 18th, 10:00 a.m. The Debtor by Mr. Sherman.

MR. HEINEMAN: Yes, Your Honor.

THE COURT: The Debtor by Michael Sherman.

I have added that to Paragraph 4, and I am initialing the changes in Paragraphs 1, 2 and 3, and the insert of Paragraph 4.

I am initialing the changes of June 8th and June 20th. Issued at 11:35 a.m., June 15th and I am signing the Order.

MR. HEINEMAN: I just wanted to address one poin' that I want to make sure that I have clear. At the last conference we indicated to Your Honor we were going to serve document requests on all parties, which we did, the document production that is to take place next Tuesday, that includes the Debtor producing the documents that are demanded of him as well?

MR. HEINEMAN: Clearly –

MR. GINSBURG: The Order that was submitted in the last paragraph on Page 3, that deals again with the demand too which relates to the information that Mr. Suriano agreed to produce to the extent available.

THE COURT: That covers it. Because it says, with all due diligence.

MR. GINSBRUG: Shall identify but not the need to produce, so that needs to be modified – and shall be required to produce such documents as they are already obtained or something.

THE COURT: All right. Strike the words "but shall not be required to produce such documents pending further remember Order of this Court" and add, "and shall produce those documents obtained." I am I initialing that.

MR. SURIANO: I want to make sure that everyone understands that what I said before in terms of considering our rights and remedies as a result of what happens today, we might very well go back, there is no surprise, we might go back to Judge — to the District Court and ask for a stay.

THE COURT: Certainly. That is — even if it is a surprise, so what?

MR. SURIANO: I feel I should say certain things to the Court and to Counsel.

THE COURT: I anticipate you are going to represent your clients in the best manner possible and if asking for a stay is one of those things you have to do, you have to do it.

This Court does not feel animosity towards the attorney that is vigorously representing his clients, as long as he does that within the rules, and I believe that is within the rules.

MR. SURIANO: Thank you, Your Honor.

CERTIFICATE

I, Theresa Glabik, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That I reported the proceedings hereinbefore set forth and that the foregoing is a true record of the proceedings herein.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

/s/Theresa Glabik

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

In re:

	Case Nos.
BEN COOPER, INC.	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.
----------X

BEN COOPER, INC.,

Plaintiff,

Assigned to: Hon. Louis L. Stanton

– against –

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

NOTICE OF CROSS-MOTION

Defendants.

Misc. No. M-47
----------X

PLEASE TAKE NOTICE, that upon the affidavit of Geoffrey W. Heineman, the exhibits annexed thereto, and upon the accompanying memorandum of law, the undersigned will cross-move this Court on behalf of defendant Kerwick & Curran, Inc., before the Honorable Louis L. Stanton, United States District Judge, at the United States Courthouse, Room 410, Foley Square, New York, New York on the 11th day of July, 1989, at 10:00 o'clock in the forenoon or soon thereafter as counsel can be heard for an order: (1) granting defendant Kerwick & Curran, Inc. leave to appeal pursuant to 28 U.S.C. section 158(a) the June 15, 1989 order of the Bankruptcy Court; (2) reversing the Bankruptcy Court's determination that this adversary proceeding is core pursuant to 28 U.S.C. section 157(b)(2)(A) and (L); (3) establishing defendant Kerwick & Curran, Inc.'s right to a jury trial in the adjudication of this controversy; (4) withdrawing reference of

the adversary proceeding commenced by Debtor Ben Cooper, Inc. against the defendants including Kerwick & Curran, Inc. from the Bankruptcy Court pursuant to 28 U.S.C. section 157(d), thereby vacating the June 15, 1989 order issued by the Bankruptcy Court below; and (5) determining that this Court should abstain pursuant to 28 U.S.C. section 1334(c) from hearing the adversary proceeding; and for such other relief as may be just and proper.

Dated: New York, New York
June 26, 1989

Respectfully submitted,

OHRENSTEIN & BROWN

By: /s/ Geoffrey W. Heineman
Geoffrey W. Heineman
Attorneys for Defendant
Kerwick & Curran, Inc.
655 Third Avenue
New York, New York 10017
(212) 682-4500

TO:

Lawrence L. Ginsburg, Esq.
Attorney for Plaintiff
Ben Cooper, Inc.
Lowenthal, Landau, Fischer & Ziegler, P.C.
250 Park Avenue
New York, New York 10177

Costantino F. Suriano, Esq.
Attorney for Defendant
The Insurance Company of the
State of Pennsylvania
Mound Cotton Wollan
125 Maiden Lane
New York, New York 10038

Victoria Stewart, Esq.
Attorney for Defendant
Kalvin-Miller Int'l, Inc.
Jackson & Nash
330 Madison Avenue
New York, New York 10017

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

In re:

	Case Nos.
BEN COOPER, INC.	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
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Debtors.
----------X

BEN COOPER, INC.,

Plaintiff,

— against —

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.
----------X

Assigned to: Hon. Louis L. Stanton

AFFIDAVIT

STATE OF NEW YORK)
:ss.
COUNTY OF NEW YORK)

GEOFFREY W. HEINEMAN, being duly sworn, deposes and says:

1. I am associated with the law firm of Ohrenstein & Brown, attorneys for defendant Kerwick & Curran, Inc. ("KC") in the captioned adversary proceeding and as such, I am fully familiar with the facts and circumstances herein.

2. I submit this affidavit in support of the cross-motion of defendant KC for an order: (i) granting KC leave to appeal pursuant to 28 U.S.C. Section 158(a) from the June 15, 1989 order of the Hon. Cornelius Blackshear; (ii) reversing the Bankruptcy Court's determination that this adversary proceeding is core pursuant to 28 U.S.C. Sections 157(b)(2)(A) and (L); (iii) establishing KC's right to a jury trial in the adjudication of this controversy; (iv) withdrawing the reference of the adversary

proceeding commenced by Debtor against the defendants (including KC) from the Bankruptcy Court pursuant to 28 U.S.C. Section 157(d), thereby vacating the June 15, 1989 order issued by the Bankruptcy Court below; and (v) determining that this Court will abstain pursuant to 28 U.S.C. Section 1334(c) from hearing the adversary proceeding.

3. In April, 1988, the Debtor, Ben Cooper, Inc. ("Debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

4. Thereafter Debtor continued to operate pursuant to Sections 1107 and 1108 of the Bankruptcy Code and in connection with those operations, Michael Sherman was appointed by the Bankruptcy Court to act as "Chief Executive Officer."

5. On or about September 30, 1988, Debtor sought and obtained a property and casualty policy (the "Policy") from defendant The Insurance Company of the State of Pennsylvania ("ICSP"). In attempting to obtain the Policy, Debtor contacted defendant Kalvin-Miller International, Inc. ("KM") who in turn contacted KC, an intermediary broker to assist in placement of the insurance coverage.

6. On January 6, 1989, Debtor allegedly sustained a fire at its manufacturing facilities in Rossville, Georgia. As a result of the fire, on or about April 13, 1989 Debtor submitted proofs of loss to ICSP purporting to demonstrate damages of $699,199.64 and business interruption losses of $1,490,580.00.

7. On April 19, 1989, ICSP commenced a declaratory judgment action in the New York State Supreme Court, County of New York against Debtor seeking to void *ab initio* the Policy issued to Debtor on the grounds that it was procured by material misrepresentations. (The complaint does not make clear the substance of the alleged misrepresentations). In addition to attempting to void the Policy, ICSP also sought a declaration that the proofs of loss purporting to demonstrate the approximate $2 million loss allegedly sustained by Debtor were based upon misstatements and were exaggerated as to the extent and value of the damages sustained.

8. On May 9, 1989, Debtor filed its adversary complaint against ICSP, KM and KC alleging that such proceeding was a core proceeding pursuant to 28 U.S.C. Section 157 (the "adversary proceeding"). By that complaint, Debtor seeks *inter alia*: (i) a declaration that the Policy provided by ICSP is valid and enforceable and provides coverage to Debtor for the alleged fire loss sustained on January 6, 1989; (ii) in excess of $2 million in compensatory damages together with punitive damages against ICSP, which damages are claimed by Debtor to constitute property of the estate which ICSP is required to turn over. In the alternative, the complaint alleges, *inter alia*, that if the Policy is not valid and does not provide coverage for the alleged fire losses, then the failure of such coverage to have been obtained will be a result of the negligence of defendants KM and/or KC. Accordingly, damages in excess of $2 million are sought under those circumstances from defendants KM and/or KC. (A copy of the adversary complaint is annexed hereto as Exhibit "A").

9. Simultaneously, with the filing of the adversary proceeding, Debtor also moved by order to show cause for a preliminary injunction enjoining ICSP: (i) from prosecuting the action commenced on or about April 19, 1989, in the Supreme Court of the State of New York; (ii) from terminating the Debtor's insurance policy issued effective October 1, 1988 – "including the provision of coverage for manufacturing facilities of Debtor and its affiliates." As part of its application to the Bankruptcy Court, Debtor also sought an order directing expedited discovery in the adversary proceeding.

10. On May 17, 1989, all parties appeared before the Honorable Cornelius Blackshear of the United States Bankruptcy Court and following oral argument, an injunction was issued precluding ICSP from prosecution of the state court action and termination of Debtor's Policy. In addition, Judge Blackshear directed accelerated discovery in the adversary proceeding. An order encompassing that ruling was subsequently signed by Judge Blackshear on May 27, 1989. (Copies of the transcript of that hearing and the May 24, 1989 order are annexed hereto as Exhibits "B" and "C", respectively).

11. Upon notice to counsel for all parties, ICSP filed an order to show cause seeking relief from the May 24, 1989 order in the United States District Court for the Southern District of New York on May 26, 1989. On May 30, 1989, defendant KC joined that aspect of ICSP's motion to the District Court that sought withdrawal of the reference by filing a cross-motion and supporting memoranda.

12. On May 31, 1989, the Honorable John M. Walker, U.S.D.J., heard oral argument on ICSP's motion to the District Court. Judge Walker declined to reach any of the requests of ICSP or KC until the Bankruptcy Court determined one threshold issue, namely whether this adversary proceeding was core or non-core pursuant to 28 U.S.C. Section 157(b). Accordingly, Judge Walker stayed all discovery requests under the May 24, 1989 order pending the Bankruptcy Court's specific determination of the core/non-core issue. Judge Walker remanded the matter back to Judge Blackshear to make such a determination and stated that the right to pursue an appeal in the District Court from the Bankruptcy Court for all parties would remain inviolate.

13. Following the scheduling by the Bankruptcy Court of a hearing on this issue for June 15, 1989, defendant KC submitted a supplemental brief in support of a determination that the action was a non-core proceeding. Counsel for Debtor, Ben Cooper, Inc. submitted two letters on June 13 and June 14, 1989, and ICSP submitted a further supplemental brief on June 14, 1989.

14. On June 15, 1989, the Honorable Cornelius Blackshear U.S.B.J. heard oral argument from counsel for all parties. (A copy of the transcript of the June 15, 1989 hearing is annexed hereto as Exhibit "D"). Judge Blackshear after argument rendered an opinion from the bench finding the adversary proceeding to be core pursuant to 28 U.S.C. Sections 157(b)(2)(A) and (L). Judge Blackshear also ordered discovery calling for the production of documents by all parties on June 20, 1989, and for the depositions to be taken on June 28, July 10, July 13, and July 18, 1989, of ICSP, KM, KC, and Debtor, respectively. (A copy of the June 15, 1989 order is annexed hereto as Exhibit "E").

15. As is more fully set forth in the accompanying memorandum of law, contrary to the Bankruptcy Court's June 15, 1989

finding, the adversary proceeding is not a core proceeding as the claims not only fail to fall within any of the enunciated definitions of such a proceeding, but further, the negligence cause of action involves solely state law questions which require neither the application nor construction of the bankruptcy law.

16. Instead the matter is a non core related proceeding to which the defendant KC is entitled to a trial by jury. Accordingly, since the Bankruptcy Court cannot render a final determination over the issues involved nor can it provide KC with a jury trial as demanded, sufficient cause under 28 U.S.C. Section 157(d) exists for the matter to be withdrawn from the Bankruptcy Court.

WHEREFORE, it is respectfully requested that this Court issue an order: (i) granting KC leave to appeal pursuant to 28 U.S.C. Section 158(a) from the June 15, 1989 order of the Honorable Cornelius Blackshear; (ii) reversing the Bankruptcy Court's determination that this adversary proceeding is a core pursuant to 28 U.S.C. Sections 157(b)(2)(A) and (L); (iii) establishing KC's right to a jury trial in the adjudication of this controversy; (iv) withdrawing the reference of the adversary proceeding commenced by Debtor against defendants from the Bankruptcy Court pursuant to 28 U.S.C. Section 157(d), thereby vacating the June 15, 1989 order issued by the Bankruptcy Court below; and (v) determining that this Court will abstain pursuant to 28 U.S.C. Section 1334(c) from hearing the adversary proceeding.

/s/ Geoffrey W. Heineman

Geoffrey W. Heineman

Sworn to before me this
23rd day of June, 1989

/s/ Jeannette Castillo

NOTARY PUBLIC

JEANNETTE CASTILLO
Notary Public, State of New York
No. 03-4898273
Qualified in Bronx County
Commission Expires Jan 5, 1991

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

In re:

	Case Nos.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.

---------- X

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.

---------- X

Assigned to Hon. Cornelius Blackshear

Adv. Pro. No. 89-5685A

SUMMONS AND NOTICE OF PRE-TRIAL

YOU ARE SUMMONED and required to submit a motion or answer to the complaint which is attached to this summons to the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall submit a motion or answer to the complaint within 35 days.

Address of the Clerk:

Clerk of the United States
Bankruptcy Court
Southern District of New York
1 Bowling Green
U.S. Custom House
Room 614
New York, New York 10004

At the same time, you must also serve a copy of the motion or answer upon plaintiff's attorney.

Name and Address of Plaintiff's Attorney:

Lowenthal, Landau, Fischer & Ziegler, P.C.
250 Park Avenue
New York, New York 10177

If you make a motion, your time to answer is governed by Bankruptcy Rule 7012.

YOU ARE NOTIFIED that a trial of proceeding commenced by the filing of the complaint will be held at the following time and place:

Address:

United States Bankruptcy Court
Room: 610-2
Southern District of New York
United States Custom House
1 Bowling Green
New York, New York 10004
Date and Time: June 15, 1989 at 10:00 A.M.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

/s/C. Lewis
Clerk of the Bankruptcy Court

By: /s/Dickson
Deputy Clerk

May 9, 1989
Date

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

BEN COOPER, INC.,
LIGHT MANUFACTURING CO., INC.,
AIMWELL PRODUCTS, INC.,
BEN COOPER SALES CORP.,

Debtors.
---------- X

Case Nos.:
88 B 10484
88 B 10547
88 B 10546
88 B 10770

BEN COOPER, INC.,

Plaintiff,

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
---------- X

Assigned to
Hon. Cornelius
Blackshear

Adv. Pro.
No. 89-5686-A

COMPLAINT

Plaintiff Ben Cooper, Inc., by its attorneys, Lowenthal, Landau, Fischer & Ziegler, P.C., for its complaint, alleges:

1. This action arises under 28 U.S.C. §1334 and 28 U.S.C. §§2201 and 2202 as more fully set forth herein.

2. This is an action for a declaratory judgment for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears, and for related monetary damages.

3. Plaintiff is a corporation duly organized and existing under the laws of the State of New York.

4. Upon information and belief, defendant The Insurance Company of the State of Pennsylvania ("ICPA") is a corporation organized and existing under the laws of the state of Pennsylvania and is authorized to conduct business in the state of New York.

5. Upon information and belief, defendant Kalvin-Miller International, Inc. ("Kalvin-Miller") is a corporation organized and existing under the laws of the state of New York and is authorized to conduct business in the state of New York.

6. Upon information and belief, defendant Kerwick & Curran, Inc. ("Kerwick & Curran") is a corporation organized and existing under the laws of the state of New York and is authorized to conduct business in the state of New York.

FIRST COUNT AGAINST ICPA

7. Prior to October 1988 through April 4, 1989, plaintiff conducted business as a debtor and debtor-in-possession under the jurisdiction of this Court.

8. On April 4, 1989, this Court entered an Order of Confirmation confirming plaintiff's Plan of Reorganization.

9. Plaintiff's Plan of Reorganization (i) compels the debtor/plaintiff to maintain insurance coverage of its business premises throughout consummation of the Plan of Reorganization, and (ii) retains jurisdiction of this Court to hear all disputes arising prior to the Order of Confirmation or relating to the consummation or implementation of the Plan of Reorganization.

10. In or about July, 1988, plaintiff consulted with Kerwick & Curran in order to review its insurance needs and to obtain insurance coverage for its business operations and facilities.

11. Thereafter, Kerwick & Curran referred plaintiff to Kalvin-Miller in order to review its insurance needs and to obtain insurance coverage for its business operations and facilities.

12. On or about October 1, 1988, defendant ICPA, its agents and/or representatives, Kalvin-Miller and Kerwick & Curran, in consideration of a premium of $57,000, which was paid, issued a "binder" insurance policy (dated October 4, 1988), insuring the property of the plaintiff (and a subsidiary and/or affiliate, Galiday), against loss, expense, and business interruption (the "Policy").

13. By its terms, the Policy was effective from October 1, 1988 through October 1, 1989. A copy of the Policy is annexed as Exhibit A.

14. The Policy insured plaintiff against "all risk."

15. On or about January 6, 1989, while the Policy was in full force and effect, plaintiff sustained a fire loss at one of its premises (Bailey Avenue and Peerless Street, Rossville, Georgia), which premises and loss were covered by the Policy.

16. As a result of the fire, plaintiff sustained damages, which, upon information and belief, will exceed the sum of $2,000,000.

17. Plaintiff's claim arose on January 6, 1989 – the date of the fire loss.

18. Defendants were fully apprised of the dimensions of the fire loss prior to April 4, 1989; however, notwithstanding such advice, ICPA refused to acknowledge its liability under the Policy.

19. On or about April 18, 1989, defendant ICPA commenced an action against plaintiff in the Supreme Court of the State of New York, County of New York, seeking, *inter alia*, a determination that the Policy was void from the date of its inception and that it had no liability to plaintiff.

20. Plaintiff has fully complied with all the terms and conditions of the Policy.

21. Such purported cancellation is wholly without justification and constitutes willful, wanton and malicious conduct on the part of ICPA.

22. By reason of the foregoing, plaintiff is entitled to a judgment declaring that: (i) the Policy is still in full force and effect, including coverage of plaintiff's manufacturing facilities, binding both plaintiff and ICPA, and thus, ICPA is liable for plaintiff's loss under the Policy, and (ii) that plaintiff has been damaged in a sum to be determined by this Court which, upon information and belief, will exceed the sum of $2,000,000.

23. By further reason of the foregoing, plaintiff is entitled to recover punitive damages from ICPA in the sum of $5,000,000.

SECOND COUNT AGAINST KALVIN-MILLER

24. Plaintiff repeats the allegations of paragraphs 1 through 23 of this complaint.

25. In or about July, 1988, plaintiff retained Kalvin-Miller to act as insurance agent to plaintiff and instructed Kalvin-Miller to procure suitable insurance protection for plaintiff's businesses and facilities.

26. Kalvin-Miller was obligated to use skill, care and diligence to procure suitable insurance protection for plaintiff.

27. Plaintiff relied on the skill and expertise of Kalvin-Miller in obtaining the Policy.

28. Plaintiff provided Kalvin-Miller with all necessary and relevant information of its business operations and facilities – including the fact that its business included manufacturing operations.

29. On or about July, 1988, Kalvin-Miller became the broker of record for plaintiff's insurance policies.

30. In or about September, 1988, plaintiff paid Kalvin-Miller $57,000 in full payment of the premiums due for the Policy.

31. Plaintiff has asserted an insurance claim based on the fire loss suffered on January 6, 1989.

32. ICPA has wrongfully dishonored plaintiff's claim – asserting that the Policy was void from its inception due to a failure to disclose information that plaintiff had provided to Kalvin-Miller.

33. If the Policy does not provide coverage for plaintiff's fire loss, then Kalvin-Miller failed to use the necessary skill, care and diligence to obtain insurance for plaintiff and was thus negligent.

34. By reason of the foregoing, if ICPA does not provide coverage to plaintiff under the Policy, Kalvin-Miller is liable to plaintiff in the amount of the fire loss and for any other damage sustained by plaintiff as a result of such lack of coverage.

THIRD COUNT AGAINST KERWICK & CURRAN

35. Plaintiff repeats the allegations of paragraphs 1 through 34 of this complaint.

36. In order to obtain the Policy, plaintiff consulted with defendant Kerwick & Curran and advised Kerwick & Curran of the nature of its operations – including its manufacturing facilities.

37. The Policy provided that it was "bound" by Kerwick & Curran.

38. In "binding" the Policy, Kerwick & Curran was required to use the necessary and customary skill, care and diligence of an insurance agent.

39. Plaintiff relied on the skill, expertise and authority of Kerwick & Curran in obtaining the Policy and in binding ICPA thereto.

40. If the Policy does not provide coverage for plaintiff's loss, then Kerwick & Curran failed to use the necessary skill, care and diligence in obtaining and "binding" the Policy and was thus negligent.

41. By reason of the foregoing, if the Policy does not provide coverage to plaintiff for its fire loss or otherwise, Kerwick & Curran is liable to plaintiff in the amount of such fire loss and other consequential damages which plaintiff may sustain.

WHEREFORE, plaintiff demands judgment:

On the First Count against ICPA, declaring:

(1) that the Policy issued to it by ICPA remains in full force and effect, including coverage of plaintiff's manufacturing facilities;

(2) that ICPA is permanently enjoined from terminating the Policy;

(3) that ICPA is liable to plaintiff under the terms of the Policy in an amount to be determined by this Court which is, upon information and belief, in excess of $2,000,000; and

(4) that plaintiff is entitled to recover punitive damages of $5,000,000;

On the Second Count against Kalvin-Miller declaring that, if ICPA is not liable under the Policy, Kalvin-Miller is liable to plaintiff in the amount of the loss sustained by plaintiff which would have been covered thereunder;

On the Third Count against Kerwick & Curran declaring that, if ICPA is not liable under the Policy, Kerwick & Curran is liable to plaintiff in the amount of the loss sustained by plaintiff which would have been covered thereunder;

On all counts, awarding plaintiff such other and further relief as to this Court seems just and proper.

Dated: May 8, 1989

LOWENTHAL, LANDAU, FISCHER & ZIEGLER, P.C.

By: s/

Lawrence L. Ginsburg
250 Park Avenue
New York, New York 10177
Attorneys for plaintiff
Ben Cooper, Inc.

UNITED STATES BANKRUPTCY
COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

In re:

	Case Nos.
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.
----------X

BEN COOPER, INC.,

Plaintiff,

– against –

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC. and KERWICK & CURRAN, INC.,

Defendants.
----------X

Assigned to:
Hon. Cornelius Blackshear

Adv. Pro No.
89-5685A

ANSWER

Defendant Insurance Company of the State of Pennsylvania Demands A Trial By Jury On All Issues

Defendant, The Insurance Company of the State of Pennsylvania ("State of Penn"), by its attorneys, Mound, Cotton & Wollan, answering the complaint, alleges:

1. Denies the allegations in paragraph 1.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 2, 3, 5, and 6.

3. Admits the allegations in paragraph 4.

ANSWERING THE FIRST COUNT

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 8 and 9, except begs leave to refer to the Order of Confirmation and Plan of Reorganization referred to therein for their content.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 10 and 11.

7. Denies the allegations contained in paragraphs 12, 13, and 14, except admits that in consideration of payment of a premium and based upon certain representations made and information submitted to it by plaintiff's authorized representatives, defendants Kerwick & Curran, Inc. and Kalvin-Miller International, Inc., State of Penn issued a policy of insurance effective October 1, 1988 bearing number 404 08 22 (hereinafter the "Policy"), and begs leave to refer to the original of the Policy for its terms and conditions.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 15 and 16, except specifically denies that the Policy was in full force and effect at the time of the alleged loss or that there was coverage.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 17.

10. Denies the allegations contained in paragraph 18, except admits that it did not accept liability and specifically avers that it has no liability to plaintiff.

11. Admits the allegations in paragraph 19, and begs leave to refer to the complaint in the action pending in the Supreme Court of the State of New York, County of New York entitled, *The Insurance Company of the State of Pennsylvania v. Ben Cooper, Inc.* for its content.

12. Denies the allegations contained in paragraphs 20, 21, 22, and 23.

ANSWERING THE SECOND COUNT

13. Except as hereinbefore admitted or otherwise pleaded to, denies the allegations in paragraph 24.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 25, 26, 27, 28, 30, 33, and 34.

15. Admits the allegations in paragraph 29.

16. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 31, except admits that plaintiff purports to have presented a claim under the Policy for an alleged January 6, 1989 loss at its Rossville, Georgia premises.

17. Denies the allegations contained in paragraph 32.

ANSWERING THE THIRD COURT

18. Except as hereinbefore admitted or otherwise pleaded to, denies the allegations in paragraph 35.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 36, 38, 39, 40, and 41, except denies that the acts of Kerwick & Curran, Inc. can bind State of Penn.

20. Denies the allegations contained in paragraph 37.

FOR A FIRST AFFIRMATIVE DEFENSE

21. This Court lacks subject matter jurisdiction over the matters set forth in the complaint, and, as a consequence thereof, the complaint should be dismissed.

FOR A SECOND AFFIRMATIVE DEFENSE

22. The complaint fails to state a claim for punitive damages.

FOR A THIRD AFFIRMATIVE DEFENSE

23. Prior to October 1, 1988, plaintiff, through its authorized representatives, made certain representations and submitted certain information to State of Penn in connection with plaintiff's request for insurance to cover various properties located in New York and elsewhere.

24. The representations made and the information submitted to State of Penn by plaintiff's authorized representatives included details concerning locations to be insured, the nature of the properties to be insured, and the nature of plaintiff's operations at each location.

25. Based upon the information and representations aforesaid, State of Penn issued the Policy subject to certain limits and other conditions, providing coverage with respect to the various locations for which plaintiff requested coverage.

26. Upon information and belief, the information and representations submitted by plaintiff's representatives were false and misleading in that, *inter alia*, the description of plaintiff's business operation was described as that of an importer and wholesaler of Halloween costumes and accessories whereas plaintiff's operations included manufacturing of merchandise. The information was further false and misleading in that the description of the locations to be insured did not accurately describe the building structures at such locations and the operations conducted therein.

27. This false and misleading information constituted a misrepresentation of material facts upon which State of Penn relied in issuing the Policy.

28. By reason of the foregoing, the Policy is void from inception thereby entitling defendant to a declaration that it has no liability under the Policy.

FOR A FOURTH AFFIRMATIVE DEFENSE

29. Defendant repeats and realleges the allegations set forth in paragraphs 23 through 28 as though fully set forth at length herein.

30. By reason of the Policy being void from inception, State of Penn is not liable to plaintiff for its alleged January 6, 1989 fire loss.

FOR A FIFTH AFFIRMATIVE DEFENSE

31. Upon information and belief, the documentation and information submitted by plaintiff and/or its authorized representatives in support of its claim for loss arising from a January 6, 1989 fire at its Rossville, Georgia premises contained false and misleading statements as to, *inter alia*, the extent of the alleged loss, the value of the property allegedly damaged or lost, and the nature of the property allegedly damaged or lost.

32. These false and misleading statements constitute a breach of the Policy by its express terms and as a matter of law.

33. By reason of the foregoing, State of Penn is not liable to plaintiff for the alleged January 6, 1989 loss.

WHEREFORE, The Insurance Company of the State of Pennsylvania demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Dated: New York, New York
June 8, 1989

MOUND, COTTON & WOLLAN
BY: /s/ Philip C. Silverberg
Philip C. Silverberg
Attorneys for Defendant
The Insurance Company of the
State of Pennsylvania
125 Maiden Lane
New York, New York 10038
(212) 804-4200

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

	Case Nos.:
BEN COOPER, INC.,	88 B 10484 (CB)
LIGHT MANUFACTURING CO., INC.,	88 B 10547 (CB)
AIMWELL PRODUCTS, INC.,	88 B 10546 (CB)
BEN COOPER SALES CORP.,	88 B 10770 (CB)

Debtors.
---------- X

AMENDED CONSOLIDATED PLAN OF REORGANIZATION

BEN COOPER, INC. ("BEN COOPER"), LIGHT MANUFACTURING CO., INC. ("LIGHT"), AIMWELL PRODUCTS, INC. ("AIMWELL"), and BEN COOPER SALES CORP. ("COOPER SALES"), DEBTORS in the above captioned Chapter 11 cases (hereinafter referred to by name or as "DEBTORS"), hereby propose the following Amended Consolidated Plan of Reorganization, pursuant to Chapter 11 of Title 11, United States Code.

ARTICLE I

DEFINITIONS

The following terms, when used in the Plan of Reorganization, shall, unless the context otherwise requires, have the following meanings, respectively:

1.1 Administrative Claims: Claims accruing after the date the Chapter 11 cases commenced, including the fees and expenses of professional persons, as defined in Sections 503 (b) and 507 (a) (1) of the Code.

1.2 "Allowed" (a) when modifying the term Claim, Priority Claim, Tax Claim or Unsecured Claim, shall mean a claim (i) as to which a timely proof of claim has been filed or is deemed to have been filed under Section 1111(a) of the Code and (ii) as to which no timely objection has been made, or which has

been allowed by a Final Order; (b) when modifying the term Administrative Claim, shall mean an Administrative Claim as to which no objection has been made or which has been allowed as such by a Final order; or (c) when modifying the term Fee Claim, shall mean a Fee Claim that has been allowed as such by a Final Order.

1.3 Cash Fund: A segregated account to be established on or before January 31, 1989, in an amount equal to 65% of General Unsecured Claims, for the sole benefit of General Unsecured Creditors and the funds on deposit therein, will be used for no purpose other than in satisfaction of the initial distribution under the Plan. If the Plan is not confirmed, then the Funds will be returned to the DEBTORS.

1.4 Chapter 11: The proceedings commenced by the DEBTORS' Petitions for Reorganization under Chapter 11 of the Code bearing Case Numbers 88 B 10484 (CB), 88 B 10546 (CB), 88 B 10547 (CB) and 88 B 10770 (CB).

1.5 Claim: Claim means: (a) a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or (b) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, secured or unsecured.

1.6 Code: The Bankruptcy Code, 11 U.S.C. Sections 1101 *et seq.*, as now or hereafter in effect.

1.7 Confirmation Date: The date of the entry of the Confirmation Order by the Bankruptcy Court confirming the Plan.

1.8 Confirmation Order: The order entered by the Bankruptcy Court confirming the Plan in accordance with the provisions of the Code.

1.9 Consummation Date: Ten business days following the Confirmation Date (but if such day is not a business day, then the

following business day) provided that no order staying Confirmation or consummation of the Plan has been entered prior thereto which is still in effect on such date. If an order staying consummation or Confirmation of the Plan has been entered, then Consummation Date shall mean the earlier of the first business day following the date upon which (a) the Confirmation Order has become a Final Order, or (b) any stay of consummation of the Plan is no longer effective, provided that such latter date is more than one day after the Confirmation Date.

1.10 Court: The United States Bankruptcy Court for the Southern District of New York having jurisdiction in this case.

1.11 Creditor: Person or entity that has a claim against the DEBTORS that arose on or before the Petition Date or Claim against the DEBTORS' estate of any kind specified in §502(g), §502(h), or 502(i) of the Bankruptcy Code.

1.12 Debtors: BEN COOPER, INC., a New York Corporation, LIGHT MANUFACTURING CO., INC., a New York Corporation, AIMWELL PRODUCTS, INC., a New York Corporation, and BEN COOPER SALES CORP., a New York Corporation.

1.13 Disputed Claims Escrow Account: Account established and maintained by DEBTORS in such amount as would be required to be paid on Consummation Date in respect of any Claim which is not an allowed Claim.

1.14 Estate: The total property of whatever kind that is owned by the DEBTORS.

1.15 Executory Contracts: Those contracts which have not expired prior to the filing of the Petitions.

1.16 Fee Claim: Shall mean a claim governed by Section 330 of the Code, subject to allowance under Section 503 of the Code, and subject to priority under Section 507(a)(1) of the Code.

1.17 Final Order: An order of the Bankruptcy Court (i) which is not the subject of an appeal, or (ii) which shall not

have been reversed, stayed, modified or amended, or (iii) from which the time to appeal, seek review, certiorari or rehearing of such order shall have become final in accordance with Rule 8002 of the Bankruptcy Rules.

1.18 General Unsecured Claim: An Unsecured Claim or Claims against the DEBTORS that is not entitled to priority pursuant to the Code.

1.19 Guarantors: Those individuals who guaranteed the Post-Petition Financing from The First Women's Bank to the DEBTORS', specifically, Ira D. Cooper and Robert Cooper.

1.20 Impaired: The legal, equitable and contractual alteration of one's rights to which a Claim or Interest attaches failure to cure any contractual default and compensate for any damages incurred as a result of the default, or the holder of a Claim or Interest will not receive cash equal to the Allowed Amount of such Claim or the greater of any fixed liquidation preference or redemption price which the holder of such Interest is entitled to receive.

1.21 Interests: The rights of owners and holders of the issued and outstanding shares of common stock or other equity securities of the DEBTORS.

1.22 Petitions: The Voluntary Petition filed by BEN COOPER pursuant to Chapter 11 of the Code, on March 8, 1988, a Voluntary Petition filed by LIGHT pursuant to the Chapter 11 of the Code, on March 15, 1988, a Voluntary Petition filed by AIMWELL pursuant to Chapter 11 of the Code, on March 15, 1988, and a Voluntary Petition filed by COOPER SALES pursuant to Chapter 11 of the Code, on April 8, 1988.

1.23 Plan: This Consolidated Chapter 11 Plan of Reorganization and any amendment thereto or modification thereof.

1.24 Priority Claim: Any Allowed Claim, other than an Administrative Claim and Tax Claim, to the extent entitled to priority in payment under Section 507 (a) of the Code.

1.25 Reorganization Cases: The case for the Reorganization of BEN COOPER commenced by Voluntary Petition under Chapter 11 on March 8, 1988, a Voluntary Petition filed by LIGHT pursuant to Chapter 11 of the Code, on March 15, 1988, a Voluntary Petition filed by AIMWELL pursuant to Chapter 11 of the Code, on March 15, 1988, and a Voluntary Petition filed by COOPER SALES pursuant to Chapter 11 of the Code, on April 8, 1988.

1.26 Reorganized DEBTOR: BEN COOPER, INC., subsequent to the Consummation Date.

1.27 Secured Claim: Any Claim collateralized by a lien or encumbrance on property in which the DEBTORS have an interest, to the extent of the value of the property.

1.28 Tax Claim: Any Claim or portion thereof against any of the DEBTORS subject to priority under Section 507(a)(7) of the Code.

1.29 The First Women's Bank: The DEBTORS' Post-Petition and Post Confirmation Financing Institution.

ARTICLE II

Substantive Consolidation

2.1 The DEBTORS submitted a Motion for Substantive and Procedural Consolidation of their respective cases. All Claims, Fee Claims and Administrative Claims against each of the DEBTORS shall be treated as Claims, Fee Claims and Administrative Claims against the Estate. Any Claim, Fee Claim or Administrative Claim against any DEBTOR that is also asserted against any other DEBTOR, on any basis, (including, without limitation, as a Co-Debtor, Guarantor, surety or joint tortfeasor) shall be treated as a single Claim, Fee Claim or Administrative Claim against the Estate. No Claim, Fee Claim or Administrative Claim of a DEBTOR against any other DEBTOR shall be allowed for purposes of this Plan and no distribution shall be made under this Plan on account of such a Claim or Administrative Claim. The Court granted the DEBTORS' Motion on January 31, 1989.

ARTICLE III

Administrative, Fee and Tax Claim

3.1 All Allowed Administrative Claims shall be paid by the DEBTORS out of the credit balance at The First Women's Bank on the Consummation Date or such other date as may be mutually agreed upon.

3.2 Unless otherwise agreed by the holder of an Allowed Fee Claim, (a) all Allowed Fee Claims for services through Consummation Date shall be paid out of the credit balance at the First Women's Bank on the Consummation Date; and (b) all reasonable Fee Claims for services after the Consummation Date by the DEBTORS' counsel, counsel to the Creditor's Committee, DEBTORS' accountants and Creditors' Committee accountants shall be paid upon rendition of bills sent to the DEBTOR and the Creditor's Committee. If neither the Creditor's Committee or the reorganized DEBTOR has objected to any such bill on or before a date that is twenty days after submission of such bill to the Creditor's committee and the DEBTOR, the DEBTOR shall pay such fees and expenses in the amounts requested. If objection is made to the amount of any fees or expenses of any professional, and such objection shall not be resolved by agreement between such professional, the Creditors' Committee and the DEBTOR, the controversy shall be submitted to the Court to which an application for compensation shall be made by the respective professional.

3.3 Unless otherwise agreed by the holder of an Allowed Tax Claim, all Allowed Tax Claims shall be paid out of the Cash Fund on the Consummation Date. However, the DEBTORS may elect to defer payments of the Allowed Tax Claims pursuant to the applicable provisions of the Code.

ARTICLE IV

CLASSIFICATION OF CLAIMS AND INTERESTS

4.1 Class 1 Claims – Shall consist of all General Unsecured Claims that are not included in Classes 2 hereof.

4.2 Class 2 Claims – Claims shall consist of all General Unsecured Claims that are less than or equal to $1,000.00 Any Class 1 Creditor may elect to become a Class 2 Creditor by reducing its claim to $1,000.00.

4.3 Class 3 Interests – Shall consist of all interests of equity security holders of the DEBTORS.

ARTICLE V

TREATMENT OF IMPAIRED CLASS UNDER THE PLAN

5.1 Class 1 – Class 1 Creditors are Impaired, and the holders thereof shall receive a distribution equal to one hundred (100%) percent of the Allowed amount of their respective Claims pursuant to provisions of the Code, in full settlement, release and discharge thereof, payable as follows: Sixty-five (65%) in cash on the Consummation Date, or as soon thereafter as is practicable, from the Cash Fund. If confirmation is delayed until a date after January 31, 1989, the DEBTORS will escrow the funds required on the Consummation Date on January 31, 1989 in an interest-bearing escrow account, to be deposited in either a money market account, a certificate of deposit, savings certificate or the equivalent, earning the prevailing rate of interest, at the First Women's Bank. The principal and interest will be distributed to the CREDITORS on the consummation date; and thirty-five (35%) percent by June 30, 1989, with interest at prime on the thirty-five (35%) percent, from January 31, 1989 until payment. The Creditors' Committee, on behalf of all Class 1 Creditors, shall receive a security interest in all assets of the DEBTORS to secure the June 30, 1989 payment, which security interest shall be subordinate to any held by the First Women's Bank and any other financial institution which may participate in the DEBTORS' Post – Confirmation financing. Said security interest shall be perfected by the Creditors' Committee and released upon the making of the June 30, 1989 payment.

5.2 Class 2 – Class 2 Creditors are impaired, and the holder thereof shall receive a distribution equal to one hundred (100%) percent of the Allowed amount of their respective Claims

pursuant to provisions of the Code, in full settlement release and discharge thereof, on the Consummation Date.

5.3 Class 3 – Class 3 Creditors are impaired. All interests of all Equity Holders of the DEBTORS are cancelled pursuant to Court Order dated September 27, 1988. Accordingly, the DEBTORS will issue 50% of the stock of the Reorganized DEBTOR to each of the two Guarantors.

ARTICLE VI

MEANS OF EXECUTION OF THE PLAN

6.1 The DEBTORS intend to implement the execution of this Plan by depositing the necessary funds in a segregated account at The First Women's Bank which meet the requirements of §345 of the Code, and such other requirements as are imposed by the Rules or the United States Trustee.

6.2 The DEBTORS intend to implement this Plan with Funds from the operations of its businesses.

ARTICLE VII

DISPUTED CLAIMS

7.1 Notwithstanding any of the provisions of the Plan, no distribution shall be made to the holder of any Claim unless and until such Claim is or becomes an Allowed Claim. On or before the Consummation Date the DEBTORS shall set aside in a separate interest-bearing escrow account, to be established and maintained by the DEBTORS in the "Disputed Claims Escrow Account", cash in such amount as would be required to be paid on the Consummation Date in respect of any Claim which is not an Allowed Claim as if the full amount of each such Claim were deemed to be an Allowed Claim, in accordance with the requirements recited in §6.1 herein.

7.2 As soon as practicable, but in no event later than ten (10) days following any such Claim becoming an Allowed Claim,

in whole or in part, the amount of cash then due to the holder of such Claim, plus interest from the date on which the Claim otherwise would have been paid, shall be paid and distributed to such holder. Thereafter, such holder shall be entitled to the treatment provided for all other holders of Class 2 Claims.

7.3 Upon any such Claim becoming a Disallowed Claim, in whole or in part, the cash reserve for the payment of the Disallowed Claim, shall become the unencumbered property of the DEBTOR.

ARTICLE VIII

EXECUTORY CONTRACTS AND UNEXPIRED LEASES

8.1 Any and all Executory Contracts or Unexpired Leases of the DEBTORS which are attached hereto as EXHIBIT "A", and have not heretofore been specifically rejected or assumed pursuant to an Order of the Bankruptcy Court or concerning which there is no application by the DEBTORS to reject pending before the Bankruptcy Court as of the Confirmation Date, are hereby specifically assumed. The Executory Contracts consist primarily of real property leases, licensee agreements, rental agreements and other miscellaneous contracts.

ARTICLE IX

CREDITOR'S COMMITTEE

9.1 As long as any payments or distributions required to be be made to holders of Allowed Unsecured Claims under this Plan remain unpaid, the Creditors' Committee shall be composed of such persons as presently constitute it and shall continue as such until all of such payments to holders of Allowed Unsecured Claims are made, at which time all powers of the Creditors' Committee shall terminate and it shall be deemed dissolved.

9.2 If any creditor represented on the Creditors' Committee shall assign its Claim or release the DEBTORS from the payment of the balance of its Claim, the member of the Creditors'

Committee representing that creditor shall be deemed to have resigned from the Creditors' Committee. In the event that a vacancy occurs on the Creditors' Committee by reason of the death of resignation of a member or because a member no longer represents the creditor which originally designated him, the vacancy thereby created shall be filled within thirty (30) days thereafter by that creditor. If the creditor fails to designate a successor to serve on the Creditors' Committee within such period, or if the resignation of a Creditors' Committee member shall result from the assignment or release of a Claim as aforesaid, then in any of such events, the remaining members acting by vote of a majority thereof, may at their sole option either (i) fill the vacancy with a representative of another Unsecured Creditor or (ii) reduce the size of the Creditors' Committee to the number of the remaining Creditors' Committee members, provided, however, that there shall never be less than five (5) members of the Creditors' Committee.

9.3 At any meeting of the Creditors' Committee, a majority of the Creditors' Committee shall constitute a quorum qualified to act, and the Creditors' Committee shall act by majority vote of those present. Meetings of the creditors' Committee shall be convened upon such notice as the Chairman of the Committee shall deem appropriate and necessary. Any member may designate a proxy for one or more meetings.

9.4 Neither the Creditors' Committee nor any of its members, agents or employees, nor the creditors represented by them shall, in any way be responsible for any of its acts or for the acts of any of its members, agents or employees, except that each member shall be personally responsible for his or its own act of willful misconduct or fraud.

9.5 The Creditors' committee and its members shall serve without compensation so long as the Creditors' Committee shall remain in existence, provided, however, that the Creditors' Committee and each member thereof shall be reimbursed by the DEBTORS for its or their reasonable expenses in connection with

the functioning of the Creditors' Committee, upon approval of the Court, including without limitation, the fees and expenses of any professionals retained by or subsequent to the Consummation Date in accordance with the provisions of the Code and Article herein.

ARTICLE X

RETENTION OF JURISDICTION

10.1 The Court shall retain jurisdiction of these cases pursuant to the provisions of Chapter 11 of the Code, until the final allowance or disallowance of all Claims affected by the Plan, and with respect to the following matters:

(a) To enable the DEBTORS to consummate all proceedings which it may bring prior to entry of the Confirmation Order, to set aside liens or encumbrances and to recover any transfers, assets or damages to which it may be entitled under applicable provisions of the Code or other Federal, State or Local law;

(b) To adjudicate all controversies concerning the classification or allowance of any Claim or equity security Interests;

(c) To hear and determine all Claims arising from the rejection of any executory contracts, including leases, and to authorize the rejection and termination of any executory contracts as to which an application for rejection or termination is filed prior to entry of the Order of Confirmation.

(d) To liquidate damages in connection with any disputed, contingent or unliquidated Claims;

(e) To adjudicate all Claims to a security or ownership interest in any property of the DEBTORS or proceeds thereof;

(f) To adjudicate all Claims or controversies arising out of any purchase, sales or contracts made or undertaken by the DEBTORS during the dependency of the within Chapter 11 case;

(g) To recover all assets and properties of the DEBTORS wherever located;

(h) To fix the allowance of compensation to all professionals retained, for services rendered during the Chapter 11 Proceedings;

(i) To determine such other matters for which provision is made in the Confirmation Order and for the purposes set forth in Section 1127(b) of the Code.

(j) To make such orders as are necessary or appropriate to carry out the provisions of this Plan, including but not limited to, orders interpreting, clarifying or enforcing the provisions thereof or determining whether or not an Event of Default has occurred.

ARTICLE XI

FUNDING OF PLAN

11.1 Prior to the Confirmation Date, the DEBTORS shall deposit in an interest bearing account at The First Women's Bank, the funds necessary to pay Class 1 and Class 2 Creditors who are required to be paid in cash on the Consummation Date (the "Cash Fund"). All interest accruing in the Cash Fund through the Consummation Date shall belong to and be paid over to the DEBTORS except as otherwise provided herein.

ARTICLE XII

COVENANTS OF THE DEBTORS

12.1 The DEBTORS shall (i) keep all of its respective properties adequately insured at all times with responsible

insurance carriers against loss or damage by fire and other hazards, and (ii) maintain adequate insurance at all times with responsible insurance carriers against liability on account of persons and property and under all applicable Workmen's Compensations laws.

12.2 The DEBTORS shall keep its properties in good repair, working order and condition and, from time to time, make all needful and proper repairs, renewals, replacements, additions and improvements thereto, so that the business carried on may be properly and advantageously conducted at all times in accordance with prudent business management.

12.3 The DEBTORS shall pay and perform promptly all of its respective obligations under the leases of real and personal property and service or other contracts, provided that it shall not be required to pay or perform any obligation under such leases and service or other contracts if such payment or performance is being contested in good faith and in appropriate proceedings and in respect of which adequate reserves have been established.

12.4 The DEBTORS shall comply in all material respects with the requirements of all applicable laws, rules, regulations and orders of any governmental authority relating to its business, provided that nothing herein contained shall require compliance with any law, rule, regulation or order if the legality or application thereof is being contested by the DEBTORS in good faith and by appropriate proceedings, and adequate reserves therefor have been established.

12.5 The DEBTORS agree to notify counsel to the Creditors' Committee of any action or proceeding against the DEBTORS or any of its property in arbitration or at law or in equity before any Federal or State Court or Governmental Commission, board or other administrative agency, or any arbitration "impartial chairman" wherein an unfavorable judgment, decision, order, ruling or finding would materially or adversely

affect the business, operations conditions, financial or otherwise, or income of the DEBTORS. Such notification shall be given to counsel to the Creditors' committee within ten (10) days from the time said action or proceeding is commenced.

12.6 The DEBTORS shall pay, in full, any and all current wages and taxes.

12.7 The DEBTORS shall pay no dividends.

12.8 The DEBTORS will make no loans or sales to officers, stockholders, employees or others, nor release or compromise any claims or debts owed to the Debtors by any officers, stockholders, employees or others without the written consent of the Creditors' Committee.

12.9 The DEBTORS shall maintain full, accurate and complete books of account in accordance with generally accepted accounting principles, which shall remain open to inspection by the Creditors' Committee or its agents or designee at all reasonable times.

12.10 The DEBTORS will not liquidate, dissolve or consent to a merger, acquisition or consolidation, without the written consent of the Creditors Committee.

12.11 The DEBTORS will not guarantee or otherwise in any way become responsible for obligations of any other person or entity.

12.12 Any investment made in the DEBTORS by any third party shall be subordinated to the rights of the creditors.

12.13 Any of the aforementioned covenants, generally or in any specific instance, may be modified or waived by a majority of the members of the Creditors' Committee called in accordance with the provisions of this Plan (hereinafter termed a "formal vote"). In the event no Creditors' Committee meeting is called

to consider such waiver, modification or consent, such waiver, modification or consent may be obtained by the assent of a majority of the members of the Creditors' Committee obtained by a poll of the Creditors' Committee, either in writing or by telephone (hereinafter termed an "Informal Vote"). Such an Informal Vote shall be conducted only by the Chairman or counsel to the Creditors' Committee.

12.14 This Plan shall be binding upon any successors or assigns of the DEBTORS.

ARTICLE XIII

EVENTS OF DEFAULT

13.1 In the event any of the following shall occur and be continuing: (a) at any time on or after the Consummation Date, the DEBTORS shall fail to pay any obligation due pursuant to the Plan on the date on which such obligation shall be stated to be due or to which it is extended pursuant to Article 3.3 and such obligation shall not be paid within thirty (30) days after such due date: or (b) the DEBTORS shall violate or fail to observe any of the covenants set forth in Article "XII" hereof and (i) shall, within ten (10) days fail to cure or (ii) shall, at the time of such violation or failure to observe, be incapable or curing within ten (10) days any such violation or failure to observe; or (c) the expiration of ten (10) days after the issuance of a Final Judgment against the DEBTORS or any of it subsidiaries for the payment of monies in excess of $10,000.00 satisfaction of which is not covered by adequate insurance (excluding any applicable deductible) and which remains unpaid for such period and as to which no stay of execution has been obtained or appeal; taken; or (d) the DEBTORS, or any of its subsidiaries shall file any petition in bankruptcy or seek Reorganization under any State or Federal Statute now or hereafter existing or shall become the subject of an Order for relief under Title 11 of the United States Code, shall be generally unable to pay its debts as they become due, shall make an assignment for the benefit of its creditors, or shall have a receiver or trustee appointed

to operate any of its businesses; then; and in each and every such case, every obligation of the DEBTORS under the Plan to make any payments on behalf of any person shall, any other provision of the Plan to the contrary notwithstanding, become immediately due and payable.

ARTICLE XIV

NOTICES

14.1 Except as otherwise herein provided, all notices required to be made in or under the Plan shall be in writing and shall be mailed by Registered Mail or Certified Mail, Return Receipt Requested.

1. If to the DEBTORS, c/o LESTER A. LAZARUS, P.C., 240 Madison Avenue, New York, New York 10016.

2. If to the Creditors' Committee, Attention: HAHN & HESSEN, 350 Fifth Avenue New York, NY 10118, Att: David Blejwas, Esq.

3. If to a creditor, at the address set forth on the DEBTORS' Schedules and on such creditor's Claim.

4. Any person may change the address at which he is to receive Notices for purposes of this Plan by sending written notice pursuant to this provision to the person to be charged with knowledge of such change. Furthermore, Notice shall be given to all of the above and their successors.

Dated: New York, New York
February 28, 1989

BEN COOPER, INC.
LIGHT MANUFACTURING CO., INC.
AIMWELL PRODUCTS, INC.
BEN COOPER SALES CORP.

BY: /s/
MICHAEL SHERMAN
Chief Executive Officer
Pursuant to Court Order

BEN COOPER, INC.
LIGHT MANUFACTURING CO., INC.
AIMWELL PRODUCTS, INC.
BEN COOPER SALES CORP.

BY: /s/
IRA D. COOPER

BEN COOPER, INC.
LIGHT MANUFACTURING CO., INC.
AIMWELL PRODUCTS, INC.
BEN COOPER SALES CORP.

BY: /s/
ROBERT COOPER

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- x

In re:	CASE NOS.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.	88 B 10770 (CB)

Debtors.
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ORDER CONFIRMING AMENDED CONSOLIDATION PLAN OF REORGANIZATION

The Amended Consolidated Plan of Reorganization referred to as (the "PLAN"), under Chapter 11 of the Bankruptcy Code, filed by BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP., on February 28, 1989, and the PLAN having been transmitted to Creditors, and the Court having found:

1. That the PLAN has been accepted in writing by the Creditors whose acceptance is required by law; and

2. That the provisions of Chapter 11 of the Code have been complied with; that the PLAN has been proposed in good faith and not by any means forbidden by law; and

3. Each holder of a claim or interest will receive or retain under the PLAN, property value as of the effective date of the PLAN, that is not less than the amount that such holder would receive or retain if the DEBTORS were liquidated under Chapter 7 of the code on such date; and

4. All payments made or promised by the DEBTORS or by any other person for services or for costs and expenses, or in connection with, the PLAN and incident to the case, have been fully

disclosed to the Court and are reasonable or, if to be fixed after confirmation of the PLAN, will be subject to the approval of the Court; and

5. The identity, qualifications, and affiliations of the persons who are directors or officers of the DEBTORS', after confirmation of this PLAN, have been fully disclosed, and the appointment of such persons to such offices, or their continuance therein, is equitable, and consistent with the interests of the Creditors and Equity Security Holders and with public policy; and

6. The identity of any insider that will be employed or retained by the DEBTORS has been fully disclosed; and

7. Confirmation of the PLAN is not likely to be followed by the need for further financial Reorganization of the DEBTORS or any successor to the DEBTORS', under the PLAN; and

8. The Court hereby retains jurisdiction for such purposes as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan and of the following additional purposes:

(a) To consider any modification of the Plan pursuant to §1127 of the Bankruptcy Code;

(b) To hear and determine:

(i) any objection to claims that may be pending at or initiated after confirmation;

(ii) all requests for compensation and/or reimbursement of expenses made by professionals which may be made after confirmation of the Plan;

(iii) any controversies, suits, disputes motion, and claims that may be pending at confirmation, or which may exist on behalf of the Debtor;

(iv) any applications or motions in connection with the liquidation of the Estate's Property which may be initiated prior to, or after confirmation.

(c) To enforce compliance with all obligations contained in the Plan and, if necessary, to effectuate payments required to be made under the Plan or hear and determine controversies and disputes arising under, or in connection with, the Plan.

IT IS ORDERED THAT:

The PLAN filed by BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., and BEN COOPER SALES CORP. on February 28, 1989, a copy of which PLAN is attached hereto, is confirmed.

Dated: New York, New York
April 4, 1989

/s/
U.S.B.J.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case Nos.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770
Debtors.	Assigned to Hon. Cornelius Blackshear

BEN COOPER, INC.,

Plaintiff,

— against —

THE INSURANCE CO. OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Preliminary Statement

Defendant The Insurance Company of the State of Pennsylvania ("ICPA") wilfully and without justification seeks to terminate the liability insurance coverage of plaintiff-debtor Ben Cooper, Inc. (the "Debtor"). Waiting until the day the Debtor's confirmed Plan of Reorganization (the "Plan") became final and non-appealable, ICPA instituted an action in the Supreme Court of the State of New York seeking to terminate the Debtor's coverage — coverage which is essential for the Debtor to continue its business and comply with its obligations under the Plan.

ICPA's state court action should be stayed or removed to this Court, which has retained jurisdiction over the Debtor's affairs, and the insurance coverage should remain in place pending a determination of the issues in this adversary proceeding.

Facts

For a complete recitation of the relevant facts in this action, the Court is respectfully referred to the affidavit of Michael Sherman, sworn to May 8, 1989.

Argument

I. THE STATE COURT ACTION SHOULD BE STATED OR REMOVED

A. Pursuant to The Order Confirming The Debtor's Plan, The Bankruptcy Court Retains Jurisdiction Over This Dispute.

The order entered April 4, 1989 confirming the Debtor's Plan (the "Order") specifically provides that the Bankruptcy Court:

> 8. retains jurisdiction for such purposes as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan and of the following additional purposes:
>
> * * *
>
> (b) To hear and determine:
>
> (i) any objection to claims that may be pending at or initiated after confirmation;
>
> * * *
>
> (c) To enforce compliance with all obligations contained in the Plan and, if necessary, to effectuate payments required to be made under the Plan or hear and determine controversies and disputes arising under, or in connection with, the Plan.

Although ICPA has commenced a declaratory judgment action in the state court (the "State Court Action") against the Debtor, this claim and dispute arose prior to confirmation of the Plan and is a dispute that must of necessity be litigated in the Bankruptcy Court by virtue of the Plan. The Bankruptcy Court has specifically retained jurisdiction to "hear and determine controversies and disputes arising under, or in connection with, the Plan" and which "may be necessary or uedful to aid in the confirmation, *consummation or implementation of the Plan*" (emphasis added).

ICPA apparently believes that the State Court Action should be litigated there, but the resolution of the dispute concerning the Debtor's insurance coverage will directly impact the Debtor's ability to consummate the Plan. If the Debtor is not recompensed for the extensive fire loss suffered and ICPA refuses to continue the Debtor's insurance coverage — including coverage of Debtor's manufacturing facilities — not only may the Debtor be unable to pay its creditors and consummate the Plan, but the Debtor may be unable to continue its business. The Plan specifically requires that the Debtor:

> keep all of its respective properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards, and (ii) maintain adequate insurance at all times with responsible insurance carriers against liability on account of persons and property and under all applicable Workmen's Compensations laws. (Plan, page 17)

Loss of its insurance coverage will not only violate the Plan, but may render it impossible for the Debtor to continue its operations and the Debtor's ability to obtain financing is conditioned upon the continuation of full insurance coverage.

The purpose of the Bankruptcy Court is "to get the creditors paid and move the debtor quickly through liquidation or reorganization." *Pied Piper Casuals, Inc. v. The Insurance Company of the State of Pennsylvania (In re Pied Piper Casuals, Inc.)*, 50 Bankr. 549 (Bankr. S.D.N.Y. 1985). Permitting the State Court Action to proceed will have a crippling effect on consummation

of the Debtor's Plan and would make it virtually impossible for the Debtor to pay its creditors and move quickly through reorganization.

B. This is A Core Proceeding.

Section 157(b) of Title 28 of the United States Code provides that:

> (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.
>
> (2) Core proceedings include, but are not limited to –
>
> (A) matters concerning the administration of the estate;
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11; . . .
>
> (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

Thus, 28 U.S.C. § 157(b) provides bankruptcy judges with authority to hear and finally determine "core proceedings, arising under title 11, or arising in a case under title 11."

As explained in *Lesser v. A-Z Associates* (*In re Lion Capital Group*), 46 Bankr. 850, 856 (Bankr. S.D.N.Y. 1985), "the constitutional ability of an adjunct bankruptcy court to determine state law issues is to be determined by the nature and extent of control by Article III courts and whether there is a nexus "between the proceeding involving a state law cause of action and the bankruptcy estate." As aptly stated in *In re Wood*, 52 Bankr. 513 (Bankr. Ala. S.D. 1985), in reliance on *Lion Capital*, Congress clearly intended that "bankruptcy judges be empowered to hear a broad range of matters subject to the substantial controls of an Article III court."

The broad reach of the bankruptcy court is further supported by 28 U.S.C. § 157(b)(3) which provides that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state law." In fact, many bankruptcy courts have relied on this section to hold that an action, even if based solely on state law, is a core proceeding if the action is necessary to carry out the central purposes of bankruptcy. *See, e.g., Franklin Computer Corp. v. Harry Strauss & Sons* (*In re Franklin Computer Corp.*), 50 Bankr. 620 (Bankr. E.D. Pa. 1985); *Baldwin-United Corp. v. Thompson* (*In re Baldwin-United Corp.*), 48 Bankr. 49 (Bankr. S.D. Ohio 1985).

The importance of the state law proceeding to the bankruptcy case justifies its treatment as a core proceeding, where it seeks recovery of assets whose prompt collection is essential to payment of creditors and the success of the reorganization. In effect, the state law nature of claims becomes irrelevant is overshadowed by the pressing needs of the creditors and the estate. *See, e.g., Franklin Computer Corp. v. Harry Strauss & Sons* (*In re Franklin Computer Corp.*), 50 Bankr. 620 (Bankr. E.D. Pa. 1985).

In *Campbell Enterprises, Inc. v. United States* (*In re Campbell Enterprises, Inc.*), 66 Bankr. 200 (Bankr. D.N.J. 1986), a case in which the debtor sought to enjoin the Internal Revenue Service from assessing or collecting a 100% tax penalty, the court held that where the assessment and collection of the penalty "will

potentially impact upon the reorganization of the debtor," the bankruptcy court, pursuant to 28 U.S.C. § 157(b), has jurisdiction over the matter.

Similarly, in the present case, the disposition ot the State Court Action "will potentially impact upon the reorganization of the debtor" and consummation of the Plan and thus, the bankruptcy court is the proper forum to hear this matter.

Here, almost immediately upon confirmation of the Plan, ICPA commenced its State Court Action. Not only is this a "core" proceeding pursuant to 28 U.S.C. § 157(b) because there is a strong nexus between this case and the bankruptcy estate, but as stated previously it is in direct contravention with the Plan.

There is every reason why the bankruptcy court should decide the Debtor's dispute with ICPA. In the interests of the speedy payment of creditors' claims and the rehabilitation of the Debtor, this core proceeding should be decided by the bankruptcy court. Not only will the outcome directly affect the Debtor's estate and consummation of the Plan, but an expeditious determination is essential to the Debtor and its creditors.

C. This Proceeding Is a Related Proceeding.

At the very least, this Court should hear and determine this proceeding as a "related" proceeding under 28 U.S.C. § 157(c). Section 157(c)(1) and (2) provides that:

> (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed finds of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer

> a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

Although this section does not define a related proceeding, Chief Justice Burger's commentary in his dissenting opinion in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), has been widely accepted as a basis for identifying the small number of claims that cannot be heard and determined by bankruptcy courts. Chief Justice Burger commented that "a 'traditional' state common-law action, not made subject to a federal rule of decision, and related *only peripherally* to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an 'Article III court' if it is to be heard by any court or agency of the United States." *Id.*, 458 U.S. at 92 (Burger, C.J., dissenting) (emphasis added).

In *In re Wedtech Corp.*, 72 Bankr. 313, 315-6 (Bankr. S.D.N.Y. 1987), the court held that an action is related to a bankruptcy "if the outcome could alter the debtor's rights, liabilities, opinions, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate." In *Wedtech*, the court explained that there was a sufficient nexus between the bankruptcy proceeding and the dispute over certain letters of credit making the dispute within the bankruptcy court's jurisdiction "far beyond the mere presence of 'common issues of fact.' " *Id.* at 316.

The insurance dispute is, at the very least, "related" to the bankruptcy case because the disposition of this dispute is integrally connected to the Debtor's ability to pay its creditors in accordance with the Plan. As such, the dispute must be heard by the bankruptcy court.

If ICPA proceeds with its State Court Action and is further allowed to terminate the Debtor's insurance policy, this will negatively impact on the consummation of the Plan. Moreover, there is a sufficient nexus between the bankruptcy proceeding and the State Court Action, making the issues involved in the State Court Action within the bankruptcy court's jurisdiction.

II. THE DEBTOR'S INSURANCE POLICY MUST REMAIN IN EFFECT AND MUST CONTINUE TO COVER THE DEBTOR'S MANUFACTURING FACILITIES

ICPA also seeks in the State Court Action to terminate the Debtor's insurance policy. If the Debtor's insurance coverage is terminated or, if it does not cover the manufacturing facilities at the Debtor's place of business, then the Debtor will be unable to meet the required obligations of its business and will be unable to consummate the Plan.

In *Pied Piper Casuals, Inc. v. The Insurance Company of the State of Pennsylvania (In re Pied Piper Casuals, Inc.)*, 50 Bankr. 549 (Bankr. S.D.N.Y. 1985), the trustee brought an action against the same defendant herein, upon an insurance policy seeking reimbursement for losses due to theft. The court held that "an action on an insurance policy either is, or bears a strong similarity to, a turnover proceeding which Congress has expressly included in its open-ended definition of core proceedings." The court further held that "[r]ecovery on insurance policies that nearly all debtors possess when entering bankruptcy are generally essential to achievement of the overall purposes of the bankruptcy court system and the Code: quick and equitable marshalling of the estate's assets, speedy liquidation and payment of creditors' claims or rehabilitating the debtor." *Id.* at 551. Moreover, "[c]ollection of insurance proceeds like that of other matured debts [are matters] which Congress intended the bankruptcy courts to hear and determine under § 157(b). An action on such collection should not be shunted off to crowded district court and state court calendars thereby frustrating these ends." *Id.* at 552.

ICPA must keep the Debtor's insurance policy in tact, pending the final determination of this action, including maintaining coverage of the Debtor's manufacturing facilities. If the insurance coverage remains in place, the Plan can be consummated, the Debtor will be able to continue its business and all creditors will be paid expeditiously.

ICPA now claims that it was never informed that the Debtor was using one of its insured premises as a manufacturing facility and thus, the insurance policy should be declared void from its inception. However, the Debtor fully informed Kalvin-Miller International, Inc. and Kerwick & Curran, Inc. (ICPA's agent) prior to procuring the policy, of all relevant information regarding its business, including the fact that it has manufacturing facilities, which were to be covered by the policy. The Debtor continued its business operation in reliance on such insurance coverage and ICPA cannot claim now, over seven months later, that it did not know that the Debtor was using its premises for manufacturing. Such a claim is patently unfair and would unduly prejudice the Debtor, its estate and its creditors. Declaring the insurance policy void from its inception would totally undermine the Debtor's ability to pay its creditors pursuant to the Plan and cannot be permitted.

Conclusion

For the foregoing reasons, the Debtor's motion for a temporary restraining order and a preliminary injunction should be granted.

Dated: May 8, 1989

LOWENTHAL, LANDAU, FISCHER
& ZIEGLER, P.C.

By: /s/Lawrence L. Ginsburg
Lawrence L. Ginsburg

250 Park Avenue
New York, New York 10177
(212) 986-1116
Attorneys for Debtor
Ben Cooper, Inc.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

In re:

	Case Nos.:
BEN COOPER, INC.,	88 B 10484
LIGHT MANUFACTURING CO., INC.,	88 B 10547
AIMWELL PRODUCTS, INC.,	88 B 10546
BEN COOPER SALES CORP.,	88 B 10770

Debtors.
---------- X

BEN COOPER, INC.,

Plaintiff,

Assigned to Hon. Cornelius Blackshear

-against-

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.
---------- X

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Preliminary Statement

In opposition to the motion of Ben Cooper, Inc. (the "Debtor") for a temporary restraining order and preliminary injunction staying the state court action commenced by defendant The Insurance Company of the State of Pennsylvania (the "Insurance Company") and preventing the Insurance Company from cancelling Debtor's insurance coverage since its inception, the Insurance Company relies on a misrepresentation of the applicable facts and a perversion of the applicable state and bankruptcy laws. Its opposition should be rejected and Debtor's

motion for a temporary restraining order and preliminary injunction should be granted pending the determination of the adversary proceeding.

The Facts

This Court is respectfully referred to the Reply Affidavit of Michael J. Sherman, sworn to May 17, 1989, for clarification and correction of the numerous factual distortions contained in the Insurance Company's Memorandum of Law.

Argument

I. THE INSURANCE COMPANY IS BOUND BY THE TERMS OF THE INSURANCE BINDER

In its Memorandum of Law, the Insurance Company argues that it is not bound by the binder insurance policy (the "Policy" — annexed as Exhibit C to Affidavit of Michael J. Sherman, sworn to May 8, 1989) because neither Kalvin-Miller International, Inc. nor Kerwick & Curran, Inc. ("Kerwick & Curran") were the Insurance Company's "agents" but were agents of Debtor. This argument flies directly in the face of long-standing and fundamental New York insurance law.

It is well settled that an insurance company is "bound by a person issuing a binder under apparent authority." 68 N.Y. Jur.2d, *Insurance*, §674 at 783. In *Schlesinger v. Columbian Fire Ins. Co.*, 37 A.D. 531, 56 N.Y.S. 37 (1st Dep't 1899), the defendant insurance company tried to avoid its liability under a "binder" policy claiming that it had never authorized the agent to issue "binders" on its behalf and thus it was not bound by such "binders". *Id.* 56 N.Y.S. at 38. The First Department ruled that the insurance company was bound by the "binders" entered into by its apparent agent, stating that receipt and acceptance of premiums was sufficient "recognition" of the agent's authority. *Id.* 56 N.Y.S. at 39.

Indeed, an agent or broker's acceptance of payment from the insured establishes a conclusive presumption that such payments bind the insurer. *Bohlinger v. Mayville Realty Co.*, 135 N.Y.S.2d 865, 867 (Sup. Ct. N.Y.Co. 1954), *aff'd*, 255 A.D. 1045, 141 N.Y.S.2d 509 (1st Dep't 1955); *Central Surety & Ins. Corp. v.*

Marro, 71 N.Y.S.2d 815 (1947). Furthermore, an insurer will be estopped from denying its relationship with an agent when the insurer knowingly permitted the agent to hold himself out as such. *Abbott v. Prudential Ins. Co. of America*, 281 N.Y. 375, 378, 24 N.E.2d 87 (1939); 68 N.Y. Jur.2d, *Insurance*, §415 at 518.

Under the circumstances of this case, it could not be clearer that Kerwick & Curran were "agents" for the Insurance Company and, therefore, that the Insurance Company was bound by the Policy. The Policy states on its face that it was "bound by Lester Edelman" of Kerwick & Curran. The Policy stated that it was effective as of October 1, 1988 and the first premium was paid to Kerwick & Curran on September 28, 1988 (Exhibit A to Affidavit of Michael J. Sherman, sworn to May 8, 1989).

The Debtor paid its premiums and received the Policy – "bound" by Kerwick & Curran. How can the Insurance Company now claim that it is not bound by the Policy – but is instead bound by a "policy" the Insurance Company sent to its *own* agent, Kerwick & Curran, nearly two months after the Policy's effective date (and after Debtor had fully paid the premiums), and which was not delivered to Debtor until *after* the fire loss?

The Insurance Company's position is specious. It cannot permit Kerwick & Curran to "bind" policies and collect premiums on its behalf and then, after a loss covered by the Policy, claim that it is not bound by the acts of its agent. The Insurance Company's position should be rejected.

II. THE BANKRUPTCY COURT HAS RETAINED AND SHOULD EXERCISE JURISDICTION OVER THIS MATTER

"The Bankruptcy Court's equitable powers are necessarily quite broad and flexible so that the Court may fashion appropriate relief." *In re Parr*, 1 B.R. 453, 456 (Bankr. E.D.N.Y. 1979). Thus, the jurisdiction of the Bankruptcy Court does not automatically terminate upon confirmation of a Chapter 11 plan of reorganization. *In re Food Fair Stores, Inc.*, 16 B.R. 387, 390 (Bankr. S.D.N.Y. 1982); *In re Sultan Corp.*, 81 B.R. 599, 602 (B.A.P. 9th Cir. 1987). In general, reorganization courts,

subsequent to confirmation, retain jurisdiction over the debtor's affairs *as specified* in the plan of reorganization or *in the order confirming the plan. In re KDI Corp.*, 14 B.R. 350, 355 (Bankr. S.D. Ohio 1981) (emphasis added).

Here, by express and unequivocal language, this Court has retained jurisdiction over the very claims at the heart of the dispute between Debtor and the Insurance Company. Paragraph 8 of the order confirming the plan provides as follows:

> 8. The Court hereby retains jurisdiction for such purposes *as may be necessary or useful to aid the confirmation, consummation or implementation of the Plan* and of the *following additional purposes:*
>
> * * *
>
> (b) To hear and determine:
>
> * * *
>
> (iii) *any controversies, suits, disputes, motion and claims that may be pending at confirmation,* or which may exist on behalf of the Debtor;
>
> (c) To enforce compliance with all obligations contained in the Plan and, if necessary, to effectuate payments required to be made under the Plan or *hear and determine controversies and disputes arising under, or in connection with, the Plan* [emphasis added].

This adversary proceeding squarely comes within this Court's express retention of jurisdiction — resolution of the dispute "may be necessary or useful to aid the confirmation, consummation or implementation of the Plan"; the adversary proceeding involves a "controversy" or "dispute . . . pending at confirmation"; and such a "controversy" or "dispute" arises "under or in connection with, the Plan."

In *In re Tacoma Boatbuilding Co.*, 81 B.R. 248 (Bankr. S.D.N.Y. 1987), the Court noted that it retained jurisdiction over

the subject adversary proceeding notwithstanding confirmation of the plan where (as here) the plan provided that the Court should retain jurisdiction for the purposes of determining all applications, adversary proceedings, and litigated matters pending upon confirmation. *Id.*, n. at 250.

As in *In re Tacoma*, this Court expressly retained jurisdiction over a broad range of matters, of which this dispute is certainly one. The exercise of jurisdiction by this Court is, therefore, proper and required.*

III. THE INSURANCE COMPANY IS NOT ENTITLED TO A JURY TRIAL

After first asking this Court to accept its argument that this dispute is merely a "related" proceeding (which ignores the express language of the order confirming the plan, not to mention the "core" nature of the dispute), the Insurance Company then reasons that since it would request a jury trial in its state court action "at the appropriate time", this Court is without jurisdiction (citing 28 U.S.C. §157(c)(1)). Even accepting the Insurance Company's erroneous argument that this is merely a "related" proceeding, its position is still indefensible because it *would not* be entitled to a jury trial in state court at *any* time.

In its state court complaint, the Insurance Company asserts three causes of action against Debtor – the first seeks rescission of the Policy and a "declaration that it has no liability thereunder"; the second and third causes of action also seem to seek a declaration of non-liability. The gravamen of the three causes of action is clearly rescission of the Policy. The state court complaint seeks no money damages.

To determine whether a party is entitled to trial by jury of state law claims, the court must examine the nature of the

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* Notwithstanding this Court's order confirming the Plan, as discussed fully in Debtor's initial Memorandum of Law, even if by its order this Court did not expressly retain jurisdiction over the dispute, as a "core" proceeding this Court would nevertheless be required to exercise jurisdiction. Furthermore, this Court could hear and determine this case as a "related" proceeding.

claims and the relief sought. *Nobile v. Pension Committee of Pension Plan*, 611 F.Supp. 725 (S.D.N.Y. 1985), *citing*, *Ross v. Bernhard*, 396 U.S. 531 (1970). The bringing of a declaratory judgment action is not itself determinative of a party's entitlement to a jury trial. "That determination requires an analysis of the legal or equitable nature of the traditional form of action which would most likely have been employed had a declaratory judgment action not been available." *Martell v. North River Ins. Co.*, 107 A.D.2d 948, 484 N.Y.S.2d 363, 365 (3d Dep't 1985).

The nature of the state court action – rescission of an insurance policy – is clearly equitable in nature. In *Phoenix Mutual Life Co. v. Conway*, 11 N.Y.2d 367, 183 N.E. 2d 754, 229 N.Y.S.2d 740 (1962), an action by an insurer to rescind an insurance policy, the New York Court of Appeals addressed this very issue. In denying a jury trial to the beneficiaries of the insurance policy, the Court stated: "Since the plaintiff brought an action in equity for rescission, *an action unquestionably triable by a Court without a jury*, the defendants do not become entitled . . . to a trial by jury." *Id.* 229 N.Y.S.2d at 742 (emphasis added). *See also Camrex (Holdings) Ltd. v. Camrex Reliance Paint Co., Inc.*, 90 F.R.D. 313, n. at 324 (E.D.N.Y. 1981).

Similarly, the Insurance Company's state court action, which seeks rescission of the Policy, is unquestionably triable by a court without a jury. The cases cited by the Insurance Company in its Memorandum of Law both involve claims *at law* and not of an equitable nature. *Cf. In re Newman Brewing Co., Inc.*, 87 B.R. 236 (Bankr. S.D.N.Y. 1988) (Debtor's action for money damages due to breach of contract); *Pied Piper Casuals, Inc. v. Ins. Co. of the State of Pennsylvania*, 72 B.R. 156 (S.D.N.Y. 197) (action by insured for money damages).* In fact, the only

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* Though the Insurance Company makes much of Debtor's inadvertent failure to cite the reversal of *Pied Piper Casuals, Inc. v. The Insurance Company of Pennsylvania*, contrary to what the Insurance Company would have this Court believe, Debtor hardly relies "solely" on *Pied Piper*. Indeed, the case is cited once in support of the general purpose of the bankruptcy court

(Footnote continued)

reason there was any question about this Court's ability to conduct a jury trial in *Pied Piper* was the fact that the Court deemed *Pied Piper* a "related" proceeding; even so, contrary to the Insurance Company's argument, the Court did not rule that a bankruptcy court could never conduct a jury trial. Indeed, there is no question that this Court could conduct a jury trial where the proceeding was a "core" proceeding or where (as here), the Court specifically retains jurisdiction over disputed matters.

Thus, the Insurance Company's argument that this Court does not have jurisdiction because it will seek a jury trial in state court is disingenuous at best. Since it could *not* have a jury trial in state court, the Insurance Company can most certainly not use its non-right to deprive this Court of its proper jurisdiction.

IV. THE DEBTOR WILL SUFFER IRREPARABLE HARM

The Insurance Company asserts that its cancellation of Debtor's Policy will not cause "irreparable harm" and that, therefore, Debtor's motion for injunctive relief should be denied. Once again, the Insurance Company misstates the facts and misapplies the law.

" 'Irreparable harm' means injury for which a monetary award cannot be adequate compensation. The expected harm must be adequately presented as 'not remote or speculative but . . . actual and imminent.' " *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F.Supp. 57, 68 (S.D.N.Y. 1981) (citations omitted). Under these standards, Debtor has clearly shown that it will be irreparably harmed if the Insurance Company is not enjoined from cancelling the Policy.

(Memorandum of Law, p. 4) and later is used as an example of a core proceeding, *not* as Debtor's sole authority for any proposition.

Even so, the decision reversing the cited case still determined that the Bankruptcy Court should retain jurisdiction over the action as a "related" proceeding. 65 B.R. at 781.

By commencing the state court action, asserting fraud on the part of Debtor, the Insurance Company has made it extremely difficult, if not impossible, for Debtor to obtain substitute insurance. Despite diligent efforts, Debtor has been unable to do so (*see* Affidavit of Michael J. Sherman, sworn to May 17, 1989, ¶12).

Pursuant to the plan of reorganization, Debtor is *required* to maintain insurance covering its properties. Cancellation of the Policy, with no ready substitute, would seriously impinge Debtor's ability to carry out its obligations under the plan and would threaten the plan's 100% payment to the creditors.

Debtor has adequately demonstrated actual and imminent irreparable harm, for which money damages would be insufficient; its motion for injunctive relief should be granted.

V. THE DEBTOR DID NOT VIOLATE ITS DUTY TO DISCLOSE

The Insurance Company's claim that Debtor failed to disclose adequate information to its creditors is likewise without merit. Section 1125 of the Bankruptcy Code defines "adequate information" as "information of a kind and in sufficient detail . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. . . ." *See In re Future Energy Corp.*, 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988) (debtors are required to transmit adequate information to allow creditors to make an informed judgment concerning the plan); *In re Monroe Well Service, Inc.*, 80 B.R. 324, 329 (Bankr.. E.D. Pa. 1987) (primary purpose of Chapter 11 plan disclosure statement is to give creditors adequate information necessary for them to decide whether to accept proposed plan); *In re Egan*, 33 B.R. 672, 675 (Bankr. N.D. Ill. 1983) (disclosure statement is intended to be source of factual information upon which one can make informed judgment about reorganization plan).

In this context, it is clear that Debtor did not fail to disclose anything. Pursuant to the plan, Debtor's payments to creditors

were to be financed; thus, its ability to meet its obligations under the plan were not dependent on resolution of the insurance claim.

Furthermore, Debtor had no reason to believe that the Insurance Company was poised to disclaim coverage on the heels of approval of the plan. Debtor assumed (incorrectly, as it turns out) that the Insurance Company was dealing in good faith with respect to its claimed loss.

Thus, Debtor provided its creditors with all the information necessary to creditors and available to Debtor in order for the creditors to make informed judgments concerning the plan. The Insurance Company's argument should be rejected.

Conclusion

For the foregoing reasons, Debtor respectfully requests that its motion for a temporary restraining order and preliminary injunction be granted.

Dated: May 17, 1989

LOWENTHAL, LANDAU, FISCHER
& ZIEGLER, P.C.

By: /s/Lawrence L. Ginsburg

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---------- X

BEN COOPER, INC.,

Plaintiff,

v. M 47

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Defendants.
---------- X

July 11, 1989
11:30 a.m.

Before:

HON. LOUIS L. STANTON

District Judge

ORAL DECISION

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(In open court)

THE COURT: Based on the written submissions and the oral arguments of counsel, it is clear to me that the adversary proceeding commenced on May 9, 1989, by Ben Cooper, Inc., against the Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc., and Kerwick & Curran, Inc., is not a core proceeding under 28 U.S. Code Section 157.

Core proceedings are those within bankruptcy cases which seek the creation, recognition, determination or adjudication of rights which do not exist independently from Title 11 or the bankruptcy case itself.

Stated differently, core proceedings are those which spring from the operation and application of the bankruptcy code itself. It is a term which is meant to encompass those proceedings which would not exist in the absence of the bankruptcy code.

In contrast, non-core or related proceedings are those which could have been brought in the district court or state court had there been no bankruptcy case filed. They exist irrespective of the fact of the bankruptcy.

The adversary proceeding here raises only state law issues, primarily whether the insurance company is liable for the losses sustained in a fire at a Rossville, Georgia plant, and if the insurance company is not liable, whether Kalvin-Miller or Kerwick & Curran are liable.

Now, of course, the outcome of that proceeding may have an economic impact on the consummation of the plan which has been approved by Judge Blackshear on April 4, but it does not follow that it is therefore a core proceeding under either Section 157(b)(2)(A) which refers to matters concerning the administration of the estate, or section 157(b)(2)(L) which concerns confirmations of plans, and to hold that it is a core proceeding under either of those clauses would read those clauses too broadly.

An action is not a core proceeding simply because its outcome can result in funds being brought into the estate. Rather, that connection makes it a related proceeding. In the Blue Point Carpet case the court pointed out that even where a breach of contract action is necessary to fund a reorganization, treatment of the matter as a core proceeding is unjustified since otherwise even the Marathon case would have constituted a core proceeding, and under that construction the bankruptcy amendments of 1984 would be as unconstitutional as was the predecessor statute.

The proceeding not being a core proceeding, it cannot be rendered a core proceeding by any provisions of the plan. This raises the question whether the reference to the bankruptcy court should be withdrawn. Title 28 United States Code Section 157 (d) states that a district court may withdraw in whole or in part any proceeding referred to under that section on timely motion of any party for cause shown.

The propriety of withdrawal in this case centers on the dispute whether the defendants are entitled to a jury trial in the adversary proceeding. Ben Cooper's complaint in the adversary proceeding contains three counts. The first seeks a judgment that the policy issued by the insurance company is still in effect and that the insurance company is liable for Ben Cooper's losses sustained in the fire at the Rossville, Georgia plant. It seeks damages of $2 million and punitive damages of $5 million.

The second and third counts respectively argue that Kalvin Miller and Kerwick & Curran were negligent in the roles that they played in helping Ben Cooper obtain insurance. The defendants' answers contain jury demands.

The defendants are entitled to a jury trial with respect to at least some of the debtor's claims and their affirmative defenses. The majority of cases hold that Congress did not intend that bankruptcy judges preside over jury trials in non-core proceedings, since the requirement of de novo review in a district court would be incompatible with the conduct of a jury trial in the bankruptcy court. Review in the district court would then

have to be by a de novo jury trial, leading to a meaningless duplication.

The necessity of preserving the defendants' right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157 (d). The reference being withdrawn, the question is whether the district court should abstain from hearing the matter and allow it to proceed in the state court.

The relevant statute, 28 United States Code Section 1334(c)(2), provides that the district court shall abstain from hearing a non-core proceeding based on a state law or a state law cause of action if an action has been commenced in the state court and that action can be timely adjudicated in a state forum of appropriate jurisdiction.

Section 1334(c)(1) permits a district court to abstain from hearing either a core or a non-core proceeding in the interests of justice or in the interests of comity with state courts or respect for state law.

As I have mentioned, the adversary proceeding here is a non-core proceeding which raises only state law issues. Pursuant to Judge Blackshear's orders, the parties have already conducted expedited discovery which pertains both to the adversary proceeding and to the pending state court action. There has been no showing that timely adjudication is not available in the state court, and this court will abstain from hearing the adversary proceeding.

The final matter relates to the bankruptcy court's preliminary injunction which on May 24 prohibited the insurance company from cancelling its policy with Ben Cooper and prosecuting its state court action.

In this circuit the standard for preliminary injunctive relief requires a showing of irreparable harm and either the likelihood of success upon the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and

a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

At this stage Ben Cooper's likelihood of success on the merits with respect to the insurance company's cancellation of its policy is at best a wide open question. There is no persuasive showing that it has a likelihood of success on the merits at this point. It may prevail or it may not. There are certainly sufficiently serious questions going to the merits to make them a fair ground for litigation.

As far as the balance of hardships is concerned, these tip in favor of the insurance company, not in favor of Ben Cooper. Unlike Judge Blackshear, I do not see how the insurance company's cancellation of its policy would jeopardize Ben Cooper's ability to pay out to its creditors. If the insurance company cancelled the policy today, such an action should have no effect on Ben Cooper's collecting $2 million or $5 million if it is entitled to do that from the insurance company for the January fire, nor would it increase otherwise, or decrease the assets available to Ben Cooper to pay its creditors.

However, by way of the injunction, the insurance company is presently being held to a risk which it says it never contracted to underwrite and for which it is receiving an inadequate premium. Ben Cooper argues that it will be difficult and may be impossible for it to obtain other insurance because of its financial situation as well as because of the insurance company's charges of deceit in the state court action. However, that is problematical. In any event, that situation has not been established as one with which it is just to tax the insurance company.

Even if it is the case that no other company wishes to assume the Ben Cooper risk, that does not justify inflicting that risk on this insurance company merely because Ben Cooper has covenanted with its creditors that it will maintain insurance on its property. The obtaining of that insurance should be left to open market forces.

Accordingly, that portion of the bankruptcy court's order of May 24, 1989, preventing the insurance company from cancelling

its insurance policy is vacated. In light of my decision to abstain from hearing the non-core adversary proceeding commenced by Ben Cooper, the remaining portion of the May 24, 1989 order which enjoins the insurance company from prosecuting the state court action is also vacated.

Is there anything further on this case?

MR. GINSBURG: Your Honor?

THE COURT: Yes.

MR. GINSBURG: In the event that Ben Cooper decides to appeal from this decision, assuming it is appealable, what would the form of request for a stay of your Honor's order —

THE COURT: I am sure it would be whatever the federal rules provide.

MR. GINSBURG: I would ask you now, then, preliminarily for a stay of your order to admit an emergency appeal to the Second Circuit.

THE COURT: I will grant you a 24-hour stay to explore your remedies and file whatever papers you wish to file.

MR. GINSBURG: Thank you. May I request a stay until the close of business tomorrow?

THE COURT: Yes.

(Proceedings adjourned)

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

See A-1 of Petition for Writ of Certiorari

(5)

No. 89-1784

Supreme Court, U.S.
FILED
AUG 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA and
KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED MAY 8, 1990
CERTIORARI GRANTED JUNE 28, 1990

BEST AVAILABLE COPY

63 pp

QUESTIONS PRESENTED

Congress's core/non-core distinction in 28 U.S.C. § 157 and the lack of clarity as to the bankruptcy court's authority to conduct jury trials have led to confusion among the courts over the proper scope of the bankruptcy court's jurisdiction. This case presents two questions integrally related to significant constitutional rights threatened by the Second Circuit's decision below.

I. Whether the post-petition status of the contract underlying this case requires a core designation pursuant to 28 U.S.C. § 157 even though the contract dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims.

II. Whether a jury trial of this case in the bankruptcy court comports with article III and the seventh amendment of the Constitution when an article I judge presides over the trial subject only to appellate review in the district court.

LIST OF PARTIES AND RULE 29.1 LIST[1]

Petitioner The Insurance Company of the State of Pennsylvania is a subsidiary of American International Group, Inc., an insurance holding company which is parent to numerous domestic property/casualty insurance companies. Said Petitioner has no subsidiaries.

Petitioner Kerwick & Curran, Inc. has no parents, subsidiaries, or affiliates.

[1] Kalvin-Miller International, Inc. did not join in the petition for a writ of certiorari, but is a party to the proceedings below as more fully described in the statement of the case herein.

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No. 89-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA and
KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

The petitioners, The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc., respectfully pray that the opinion and order of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on February 7, 1990, be reversed with respect to those portions of the order which stated that the underlying dispute is a core matter and that the bankruptcy court is the proper forum for a jury trial.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 896 F.2d 1394 (2d Cir. 1990). It appears in the appendix to the petition for a writ of certiorari at A-1.[2]

[2] References to "A-" followed by a page number indicate reference to the appendix to the petition for certiorari.

The oral opinion and order of the District Court for the Southern District of New York has not been reported. It is reprinted at J.A. 83.[3]

The oral decision and order of the Bankruptcy Court for the Southern District of New York determining that this adversary proceeding is core has not been reported. The pages of the transcript of the hearing in which the ruling appears are reprinted at J.A. 183.

The oral ruling of the District Court for the Southern District of New York directing the bankruptcy court to determine whether this adversary proceeding is core has not been reported. The transcript of the hearing in which the district court's oral ruling appears is reprinted in the Joint Appendix at J.A. 68.

The oral ruling of the Bankruptcy Court staying the prosecution of the state court action instituted by petitioner, the Insurance Company of the State of Pennsylvania, has not been reported. The transcript of the hearing in which the court so ruled is reprinted at J.A. 37.

JURISDICTION

The jurisdiction of this Court to review the order of the Court of Appeals for the Second Circuit is invoked under 28 U.S.C. § 1254(1). Certiorari was granted on June 28, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved in this appeal are:

U.S. Const. art. I, § 8, cl. 4.

> Congress shall have the power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

U.S. Const. art. III, § 1.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold

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[3] References to "J.A." followed by a page number indicate reference to the Joint Appendix submitted herewith.

> their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. amend. VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The statutes involved in this appeal are 28 U.S.C. § 157 (reprinted at A-31), 28 U.S.C. § 158 (reprinted at A-33), 11 U.S.C. §§ 301 and 541(a) (reprinted in the appendix to respondent's brief in opposition to the petition at A-36) and 28 U.S.C. §§ 151 and 152(a)(1) and (e) (reprinted below).

> § 151 In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

> § 152(a)(1) . . . Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

> * * *

> (e) A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability . . . .

STATEMENT OF THE CASE

The respondent, Ben Cooper, Inc. ("Cooper"), a costume and toy importer and manufacturer, filed a Petition for Reorganization under Chapter 11 of the Bankruptcy Code in April 1988. Cooper continued to operate as a debtor in possession. In the summer of 1988, Cooper retained two insurance brokers, petitioner Kerwick & Curran, Inc. ("KC") and Kalvin-Miller International, Inc. ("K-M"), to procure insurance for its business operations. In October 1988, KC and K-M obtained from petitioner The Insurance Company of the State of Pennsylvania ("ICSP") a property and general liability policy of insurance (the "Policy") covering Cooper as debtor in possession. Court of Appeals J.A. 45.*

On January 6, 1989, a fire occurred at Cooper's manufacturing facility in Rossville, Georgia. On April 13, 1989, Cooper filed proofs of loss with ICSP, claiming $699,199.64 in property damages and $1,490,580.00 in business interruption losses arising from the fire (the "Loss"). Court of Appeals J.A. 117.

ICSP's investigation of the Loss revealed that the nature of the insured's operations and facilities were not what had been represented to ICSP when coverage was initially sought. Specifically, although ICSP had been told that Cooper sought insurance on only warehouse and office locations, at least some of the facilities identified – notably including the location of the Loss – were used for manufacturing, an entirely different and more hazardous type of risk. ICSP advised Cooper that the failure to reflect the true nature of the risk voided coverage. J.A. 6. Accordingly, ICSP commenced an action against Cooper in the New York State Supreme Court, County of New York, seeking, *inter alia*, a declaration that the Policy was void *ab initio* on the ground that its issuance had been induced by material misrepresentation.

ICSP's action also sought a declaration that there was no liability under the Policy in any event because of Cooper's misrepresentations and fraudulent exaggerations relating to the Loss. At the same time that it brought suit in state court, ICSP sent

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* References to "Court of Appeals J.A." followed by a page number indicate reference to the Joint Appendix for the appeal from the United States District Court for the Southern District of New York submitted to the court below.

Cooper a notice of cancellation of the Policy based upon those misrepresentations it had raised in the suit. Court of Appeals J.A. 118.

In response to ICSP's state court action, Cooper commenced an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York (the "Adversary Proceeding") seeking various forms of relief against ICSP, KC, and K-M. In its complaint, Cooper alleged that ICSP was liable under the Policy for the Loss and that the insurance company's failure to accept liability and make payment was a breach of contract. In the alternative, Cooper alleged that if the Policy were found to be void or not to provide coverage for the Loss, the lack of such coverage would have been the result of the negligence of its brokers, KC and K-M. Cooper sought money damages in excess of $2,000,000 from all defendants as well as punitive damages in the sum of $5,000,000 from ICSP. J.A. 134.

When it commenced the Adversary Proceeding, Cooper also moved the bankruptcy court by order to show cause for a stay of ICSP's previously filed state court action on the ground that the controversy was a core matter as defined by the Bankruptcy Amendments and the Federal Judgeship Act of 1984 (the "BAFJA") and should be adjudicated in the bankruptcy court. Cooper also sought to stay ICSP's cancellation of the Policy. J.A. 19, 34.

In its answer to Cooper's complaint, ICSP pleaded that the bankruptcy court lacked jurisdiction and also raised by way of defense the same matters it had alleged in its state court complaint. In addition, ICSP demanded a jury trial, as did KC and K-M in their answers to Cooper's complaint. J.A. 140.

The Honorable Cornelius Blackshear, U.S.B.J., (United States Bankruptcy Court for the Southern District of New York) granted Cooper the relief it had sought in its motion by order to show cause. In a May 17, 1989 hearing, Judge Blackshear, ruling from the bench, stayed the state court action, enjoined cancellation of the Policy, and ordered expedited discovery. J.A. 37.

Following Judge Blackshear's ruling, ICSP, joined by KC and K-M, applied to the United States District Court for the Southern District of New York for an order lifting the stay of the state court

proceeding and withdrawing the reference to the bankruptcy court on the ground that the bankruptcy court was without jurisdiction to grant the relief provided in its order. In a hearing on May 31, 1989, the Honorable John M. Walker, U.S.D.J., declined to rule on the substance of the application until the bankruptcy court resolved the threshold issue of whether the Adversary Proceeding was a core or non-core proceeding under the BAFJA. Accordingly, the district court remanded the matter to the bankruptcy court for such determination. J.A. 68. On June 15, 1989, oral argument was heard before Judge Blackshear, who ruled from the bench that the Adversary Proceeding was core pursuant to 28 U.S.C. §§ 157(b)(2)(A) (estate administration) and (L)(confirmation of plans). At the hearing, Judge Blackshear expressed skepticism as to whether ICSP and its co-defendants were entitled to a jury trial. He concluded, however, that in view of his finding that the Adversary Proceeding was core, the matter would remain within the bankruptcy court for plenary adjudication and fact finding. J.A. 83.

Following the bankruptcy court's ruling that Cooper's proceeding was core, ICSP, KC, and K-M moved the district court for relief from the bankruptcy court's initial order. In an oral ruling on July 11, 1989, the Honorable Louis L. Stanton, U.S.D.J., reversed Judge Blackshear's ruling and lifted the stay of the state court proceeding on the ground that the bankruptcy court was without jurisdiction under the circumstances; withdrew the reference to the bankruptcy court; and abstained from exercising jurisdiction in the district court. In addition, Judge Stanton lifted the stay which had enjoined ICSP from canceling the Policy. The district court found that the controversy, which concerned only state law issues as to an insurance company's liability for a loss sustained by an insured, was not rendered core merely because its resolution might bring funds into, or otherwise affect administration of, a bankruptcy estate. The district court's withdrawal of the reference was also based in part on the finding that ICSP and its co-defendants were entitled to a jury trial. Judge Stanton concluded that the requirement of district court *de novo* review of findings of fact in a non-core matter would be incompatible with the conduct of a jury trial in the bankruptcy court. J.A. 183.

Cooper appealed the district court's ruling which had lifted the stay. The court of appeals reversed the district court, in part, holding that the proceeding was core because the underlying contract, the Policy, had been entered into subsequent to the filing of Cooper's bankruptcy petition. Therefore, the Second Circuit reasoned, the resolution of the dispute would necessarily affect administration of the estate. The court of appeals further held, however, that all of the defendants were entitled to a jury trial, and that such jury trial should be conducted by the bankruptcy court. A-1.

On May 8, 1990, ICSP and KC filed a petition for a writ of certiorari in this Court to review certain portions of the decision of the court of appeals. Certiorari was granted on June 28, 1990.

SUMMARY OF ARGUMENT

A.

The court of appeals below concluded that under the Bankruptcy Amendments and the Federal Judgeship Act of 1984 a dispute between an insurer and its insured over a claim under an insurance policy is a core matter by virtue of the fact that the insurance contract was issued post-petition to a debtor in possession. In arriving at its conclusion, the court gave an expansive reading to the BAFJA while virtually ignoring the Court's dictates in *Marathon*, even though the BAFJA constitutes nothing more than Congress's attempt to implement the essence of what the Court held in *Marathon* with respect to the constitutional limits of an article I court's jurisdiction.

Under the rule in *Marathon*, Congress cannot vest in non-article III courts the power to adjudicate basic state law contract claims. Rather, a bankruptcy court's jurisdiction is circumscribed. It is limited to the adjudication of matters which are at the heart of the operation of the bankruptcy system itself and the specialized matters which are unique to bankruptcy, *e.g.*, the allowance or disallowance of claims, turnover proceedings, the discharge of debts, the distribution of proceeds, and the liquidation of assets. The Second Circuit failed to evaluate the subject dispute in terms of whether it arose under title 11 or in a title 11 case. Clearly, an insurance coverage dispute would not fit either category under 28 U.S.C. § 157(b)(1). The matter would be non-core — outside the bankruptcy court's jurisdiction.

Instead of giving effect to 28 U.S.C. § 157, the court of appeals seized upon the fact that the contract at issue was entered into post-petition, notwithstanding that under *Marathon*, the distinction is of no importance. Whether an insurance contract giving rise to a disputed claim was entered into pre-petition or post-petition does not change the character of a dispute, nor does it transform an otherwise ordinary state law contract claim into a matter at the heart of the bankruptcy powers, a pre-requisite to a proper core designation under *Marathon*. The claim in this case concerns private rights, outside the scope of article I adjudication.

B.

The petitioners, having made a timely demand, are entitled to a trial by jury in an article III court. In *Granfinanciera* the Court held that the seventh amendment right to a jury trial cannot be compromised merely because the underlying dispute is with a debtor in possession. The nature of the controversy, in this case a contract law claim which will be resolved on the basis of state law, is determinative of petitioners' jury trial right. Since under 28 U.S.C. § 157(c)(1) there is *de novo* review of findings of fact in a non-core matter, an initial jury trial of such a matter in the bankruptcy court would not only be a useless exercise, wasteful of judicial resources, but would also violate the seventh amendment, which proscribes reexamination of findings of fact under such circumstances. Accordingly, a jury trial of a non-core matter cannot take place in the bankruptcy court.

As a separate consideration, it is clear that Congress did not intend under the BAFJA that bankruptcy judges conduct jury trials in cases such as this. The statute does not contain any express provision so empowering the bankruptcy judges and a review of the legislative history discloses no indication that Congress contemplated the conduct of jury trials in the bankruptcy court.

Independent of the analysis of any statutory provision, article III prohibits the conduct of jury trials in the article I bankruptcy courts. The Court's pronouncements in *Marathon* and *Granfinanciera* lead ineluctably to the conclusion that in any matter which, by its nature, would give rise to a seventh amendment right of trial by jury, relegation of that jury trial to an article I court would be in violation of article III.

ARGUMENT

I. THE UNDERLYING DISPUTE IS A NON-CORE RELATED MATTER UNDER THE BANKRUPTCY AMENDMENTS OF 1984.

A. Background Of This Jurisdictional Dispute.

Petitioner ICSP is one of many non-debtor/non-creditor litigants to be swept unwilling into the "maze"[5] or "maelstrom"[6] of litigation concerning the proper extent of bankruptcy court jurisdiction under the Bankruptcy Amendments and the Federal Judgeship Act of 1984 (the "BAFJA"). ICSP finds itself facing these issues by virtue of its having sued in state court for a declaration as to whether it is liable under a policy of insurance it issued to a company which happened to be a debtor in possession. In response, the debtor in possession instituted an adversary proceeding against ICSP in the bankruptcy court seeking, *inter alia*, contract damages and punitive damages from ICSP. The debtor's position, which was upheld by the court of appeals below, was that its dispute with ICSP and the brokers who placed the insurance coverage is properly designated as a core matter under 28 U.S.C. § 157 and can be disposed of in a non-article III bankruptcy court. ICSP contends that the underlying dispute, which originated in, and is controlled by, state common law, must be adjudicated in a federal district court or a state court.

The court of appeals below, following the First Circuit's decision in *Arnold Print Works, Inc. v. Apkin*, 815 F.2d 165 (1st Cir. 1987), concluded that the issuance of the Policy post-petition *ipso facto* rendered the dispute a core proceeding. It is submitted that this rule does not comport with this Court's interpretation of the requirements of article III of the Constitution as set forth in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) and *Granfinanciera, S.A. v. Nordberg*, ____U.S.____, 109 S.Ct. 2782 (1989). This Court need not find the BAFJA unconstitutional in order to hold that the underlying

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[5] *In re S.E. Hornsby & Sons Sand and Gravel Co.*, 45 Bankr. 988, 990 (Bankr. M.D. La. 1985).

[6] *Satelco, Inc. v. North American Publishers, Inc. (In re Satelco, Inc.)*, 58 Bankr. 781, 783 (Bankr. N.D. Tex. 1986).

dispute is non-core. The reasoning of such cases as *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987) and *Piombo v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986), demonstrates that the BAFJA does not mandate reference of the underlying dispute to the bankruptcy court. Those cases hold, as did the district court below, that core matters are those "which seek the creation, recognition, determination or adjudication of rights which do not exist independently from Title 11 or the bankruptcy case itself." J.A. 184. See discussion of *Wood* and *Castlerock* at 20-22, *infra*.

The court of appeals below stated that its interpretation and application of the BAFJA was consonant with Congress's intent that the bankruptcy court's jurisdiction be as broad as would be possible without violating constitutional proscriptions. A-9, 10. In pursuing that goal, however, the court of appeals failed to give sufficient consideration to the context in which the statute came into being, to wit, as a response to this Court's pronouncements in *Marathon*, a case which, itself, was the product of a substantial history. Unfortunately, the court below swallowed the rule of *Marathon* and disregarded the guidelines of *Granfinanciera*. The BAFJA should not be interpreted to sweep this *Marathon*-type action into the core jurisdiction of an article I bankruptcy court.

B. Jurisdiction Conferred By The BAFJA Must Be Construed In Light Of The *Marathon* Decision.

Bankruptcy jurisdiction in this country has a bedeviled and befuddling history reaching back more than a century. The current daily wrangling over core versus non-core designation of a civil proceeding is reminiscent of the constant litigation engendered by the summary/plenary distinction under the Bankruptcy Act of 1898 (the "1898 Act").[7] The Bankruptcy

[7] The 1898 Act provided a convoluted, bifurcated jurisdictional scheme. Non-article III bankruptcy referees were permitted to exercise "summary jurisdiction" over disputes under limited circumstances. Controversies over property not in the possession of the bankruptcy court where the adverse party's claim was more than colorable were heard in plenary proceedings in the district court if an independent basis of jurisdiction existed; otherwise such controversies were heard in the state court. Under the 1898 Act, without the consent of the litigants, a

(Footnote continued)

Reform Act of 1978 (the "1978 Act"), whose jurisdictional provision was struck down in *Marathon*, was enacted in part to eliminate the time-consuming jurisdictional challenges which had become a routine matter under the 1898 Act. The 1978 Act abolished the confusing distinction between summary and plenary jurisdiction and permitted all disputes related to a bankruptcy case to be brought before the non-article III bankruptcy judges.[8]

In *Marathon*, the Court addressed the question of whether Congress could vest in a non-article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, subject only to ordinary appellate review. *Marathon*, 458 U.S. at 84. The majority held[9] that Congress could not so act. *Marathon* invalidated the sweeping grant of bankruptcy court jurisdiction provided by the 1978 Act.

The BAFJA was enacted in response to the *Marathon* decision. In the BAFJA, Congress attempted to redress the constitutional infirmities of the 1978 Act's jurisdictional provisions by distinguishing "core" proceedings (claims arising in and under Title 11) from "non-core" proceedings (claims "related" to Title 11 cases) that is, traditional claims arising under state law. Congress derived the "core" concept from the *Marathon* decision, which confined the proper scope of a non-article I bankruptcy court to the "restructuring of debtor-creditor relations, which is at the core of the federal

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Marathon-type suit would have required a plenary proceeding. *Harrison v. Chamberlin*, 271 U.S. 191, 193-194 (1926).

Justice Brennan, writing for the plurality in *Marathon*, called into question the constitutionality of the entire referee system in bankruptcy matters: "Appellants and Justice White's dissent also rely on the broad powers exercised by the bankruptcy referees immediately before the Bankruptcy Act of 1978. . . . But those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee, (citation omitted), have never been explicitly endorsed by this Court." *Marathon*, 458 U.S. at 79 n. 31.

[8] Subsection (c) of § 1471 of the 1978 Act (struck by *Marathon*) stated:

> The bankruptcy court for the district . . . shall exercise all of the jurisdiction conferred by this section on the district courts.

[9] Two justices concurred in the judgment announced by the plurality opinion.

bankruptcy power." *Marathon*, 458 U.S. at 71. The remedy the BAFJA supplies for the 1978 Act's jurisdictional infirmities is the denial to the bankruptcy court of power to enter a final order in non-core matters.

Case law demonstrates that the BAFJA must be tempered by reference to the principles enunciated in *Marathon* and *Granfinanciera*. The court below failed to confront the teaching of those cases and returned the parties to the pre-*Marathon* era. Yet, other courts have demonstrated that the BAFJA, construed as the post-*Marathon* product which it is, can properly be read without infringing upon the constitutional rights of litigants. Indeed in *Granfinanciera* this Court looked beyond the literal meaning of §157(b)(2)(H) to discern the common-law nature of the underlying fraudulent conveyance dispute, which entailed a jury-trial right and, by implication, an entitlement to an article III forum.

C. The Underlying Case Is Non-Core Since It Does Not Arise Under Title 11 Or In A Title 11 Case.

The core/non-core dichotomy is the essence of the jurisdictional system designed by Congress in the wake of this Court's invalidation of 28 U.S.C. § 1471 in *Marathon*. The core/non-core determination has significant substantive and procedural consequences, because the bankruptcy court's jurisdiction over non-core matters is restricted as compared to its jurisdiction over core matters.

The BAFJA does not require the district courts to refer bankruptcy cases to the bankruptcy courts, but allows them to do so. Section 157(a) permits the district court to make a general reference of all Title 11 cases and proceedings to the bankruptcy judge. 28 U.S.C. § 157(a) provides that district courts may refer "cases under title 11 and any or all proceedings arising in or related to a case under title 11" to bankruptcy judges. Of the cases referred to them pursuant to § 157(a), bankruptcy judges are authorized to "hear and determine" "cases under title 11" and "core proceedings" arising under Title 11. 28 U.S.C. § 157(b) (Supp. V 1988). The "cases under title 11" and "core proceedings" heard and determined by bankruptcy judges pursuant to § 157(a) and (b) are subject to review by a district court "in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts." 28 U.S.C. § 158(c) (Supp. V 1988).

Non-core proceedings related to cases under Title 11 may also be referred to bankruptcy judges pursuant to 28 U.S.C. § 157(a). However, unless the parties stipulate otherwise, bankruptcy judges are authorized only to "hear" non-core proceedings referred to them and submit proposed findings of fact and conclusions of law to the district court for *de novo* review. 28 U.S.C. § 157(c)(1).

To fall within the "core" category of proceedings in which a bankruptcy court may enter a final order, a civil proceeding must either arise under a provision of Title 11; or "arise in" the Title 11 bankruptcy case (28 U.S.C. 157(b)(1)). The statute does not define core proceedings.[10] Subsection (b)(2) does provide a non-exclusive list of matters that are "core." There are thirteen rather specifically described types of proceedings, and two "catchall" provisions, "A" and "O." Numerous commentators have noted that the two catchalls, if broadly construed, could embrace every conceivable matter (including what was at issue in *Marathon*) that could have any effect on a bankruptcy case. *See, e.g., Sokol v. Massachusetts Life Ins. Co. (In re Sokol)*, 60 Bankr. 294, 297 (Bankr. N.D. Ill. 1986) (*see* discussion at 24-25, *infra*).

An insurance dispute seeking proceeds of a policy and a declaration that coverage is in effect is not an enumerated core matter. This fact alone, taken in the light of the BAFJA background and the nature of the list of core matters in 28 U.S.C.

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[10] The failure to provide a specific and exhaustive definition of core proceedings has resulted in considerable confusion. "The term 'core proceedings' is a new term of art, coined to describe the concept of foreshortened jurisdictional boundaries of bankruptcy courts. Only time and case law can bring the concept out of the chiaroscuro of new legislation into well-rounded and comprehensive definition." *Allis-Chalmers Corp. v. Borg-Warner Acceptance Corp., (In re D.C. Huff Co. Inc.)*, 44 Bankr. 129, 134 (Bankr. W.D. Ky. 1984).

It is noteworthy that the Judicial Conference of the United States, which drafted the post-*Marathon* Model Emergency Rule delineated "related proceedings" in which bankruptcy judges were not permitted to enter final orders as "civil proceedings which, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court." Model Emergency Rule § (d)(3)(A), reprinted in 1 *Collier on Bankruptcy* (15th ed.) ¶ 3.01(1)(b)(vi).

§ 157(b)(2), leads to the conclusion that such a dispute is not core.[11] Even if it were included within the literal language of one of the illustrative core proceedings, it would still not be appropriate for final resolution by a bankruptcy court unless it "arose under" a provision of Title 11; or "arose in" the Title 11 bankruptcy case.

Because the wording of the illustrative core proceedings is vague and ostensibly all-encompassing, courts refer back to the basic grant of reference (of "all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11," 28 U.S.C. § 157(b)(1)) to determine whether the matter may properly be considered core. Thus, in *Satelco, Inc. v. North American Publishers, Inc. (In re Satelco, Inc.)*, 58 Bankr. 781 (Bankr. N.D. Tx. 1986), the debtor had sought to bring a state law contract action into the bankruptcy court as a core proceeding under 28 U.S.C. §157(b)(2)(E), "orders to turn over property of the estate." The court distinguished the state-law action, which was non-core, from the core turnover proceeding which would follow it and would properly take place before the bankruptcy court. The court in *Dekalb Medical Bldg. Partnership v. Sturm (In re Sturm)*, 66 Bankr. 325, 327 (Bankr. N.D. Ill. 1980), applied a similar analysis to a proceeding in which the debtor's complaint invoked core jurisdiction under 28 U.S.C. § 157(b)(2)(I) ("determinations as to the dischargeability of particular debts"). The court held that the state-law contract claim had to be liquidated in the district court, before the dischargeability issue, which arises under 11 U.S.C. § 523(a)(2), could be determined in the bankruptcy court.[12]

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[11] "Claims (whether state-law or not) by the debtor against a non-creditor do not appear in the list of 'core proceedings' given in § 157 (b)(2). True, § 157(b)(2) expressly states the list is illustrative and not exhaustive, but because the list given is extensive, specifically includes one kind of claim made by debtors (namely, counterclaims against creditors; see § 157(b)(2)(C)), and because claims against non-creditors are an important category of cases very much on Congress' mind when the 1984 Act was passed [citing *Marathon*], this court concludes that if Congress had wanted this kind of case to be considered a core proceeding it would have included it in the given list." *UNR Industries, Inc. v. Continental Ins. Co.*, 623 F. Supp. 1319, 1332 (D.C. Ill. 1985).

[12] The "arising in/arising under" analysis performed by some courts is identical to the analysis other courts perform in applying the *Marathon* decision to clarify the statutory provisions. The crux of the exercise is to decide what is core under *Marathon* and determine jurisdiction accordingly.

Clearly, the underlying case is not a claim grounded on any provision of the Bankruptcy Code. Nor does the suit arise in a Title 11 case. The Fifth Circuit explained the meaning of proceedings "arising in" a case under Title 11 as "administrative matters that arise *only* in bankruptcy cases." *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987).[13] Distribution of proceeds of an insurance policy may be an administrative matter that "arises in a Title 11 case." The determination of the insurer's liability on a policy, however, is entirely independent of bankruptcy administration and in no sense can be said to arise under Title 11 or in a Title 11 case.[14]

The factual circumstances of Cooper's claim – that the Policy was issued during the pendency of the Chapter 11 case and that the proceeds, if any, will become property of the estate for distribution – do not mean that the suit on the Policy itself turns on any federal rule of decision. The insurance suit, which was brought originally in state court by the petitioner ICSP, has an existence independent of any type of bankruptcy case under the Bankruptcy Code.

II. THE UNDERLYING INSURANCE DISPUTE, WHICH CONCERNS ONLY PRIVATE RIGHTS, FALLS SQUARELY WITHIN THE RULE OF *MARATHON* AND THUS MUST BE A NON-CORE RELATED PROCEEDING.

Independent of any right under the BAFJA, petitioners have a constitutional right, under *Marathon* and *Granfinanciera*, to an article III forum. The court below improperly designated as a core matter a suit involving only state-created private rights. The relegation of post-petition contract disputes to an article I forum would deprive petitioners of constitutional guarantees under article III.

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[13] *Accord, Atlas Automation, Inc. v. Jensen, Inc. (In re Atlas Automation, Inc.)*, 42 Bankr. 246 (Bankr. E.D. Mich. 1984); *Dakota Grain Systems, Inc. v. Rauser Constr., Inc. (In re Dakota Grain Systems, Inc.)*, 41 Bankr. 749 (Bankr. D.N.D. 1984); *Weeks v. Kramer (In re G. Weeks Securities, Inc.)*, 89 Bankr. 697, 705 (Bankr. W.D. Tenn. 1988).

[14] The interpretation of "arising in" jurisdiction exemplified in *Wood* (and in the 9th Circuit case of *Castlerock* – see discussion at 20-22, *infra*) results in a constitutionally permissible scope of article I jurisdiction, gauged by the *Marathon* standard.

A. Article I Jurisdiction Over The Underlying Dispute Is Improper Under *Marathon*.

Cooper argued below that its adversary proceeding against ICSP was core under "at least" four provisions of 28 U.S.C. §157(b)(2): subsection (A) (administration of the estate); subsection (E) (turnover of estate property); subsection (L) (confirmation of plans); and subsection (O) (other proceedings affecting the liquidation of the estate or adjustment of the debtor-creditor relationship).[15] The bankruptcy court determined that it had jurisdiction under subsections (A) and (L). J.A. 112. The court of appeals found jurisdiction under subsection (A). A-12. ICSP maintains that the underlying insurance dispute, however denominated, cannot be adjudicated by a non-article III tribunal. If the present dispute is a core matter, then the proceeding involved in *Marathon* would be a core matter. Any application of the BAFJA which extends core jurisdiction over a purely state common-law dispute to an article I court, with only ordinary appellate review by an article III court, is constitutionally infirm under *Marathon*.

In *Marathon*, the Northern Pipeline Construction Company, which had filed a petition for reorganization, sued Marathon Pipe Line Company ("Marathon") in bankruptcy court for, *inter alia*, breach of contract and warranty. Marathon, like petitioner ICSP here, had filed no claim against the bankruptcy estate. The plurality opinion emphasized there that such state-law causes of action are "paradigmatic private rights, even when asserted by an insolvent corporation in the midst of chapter 11 reorganization proceedings." *Granfinanciera*, 109 S.Ct. at 2786, *citing Marathon*, 458 U.S. at 71. The majority of the *Marathon* Court held that article I jurisdiction over such a dispute impermissibly encroached upon the powers vested by article III in the judiciary.

Thomas v. Union Carbide Agr. Products Co., 473 U.S. 582, 584 (1985), concisely set out the narrow holding of *Marathon*:

> The Court's holding in that case establishes only that Congress may not vest in a non-Article III court the

[15] *See* brief of plaintiff-appellant Cooper in the court of appeals p. 15.

> power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review. 458 U.S. at 84, 102 S.Ct. at 2878 (plurality opinion); *Id.* at 90-92, 102 S.Ct. at 2881-2882 (opinion concurring in judgment); *Id.* at 92, 102 S.Ct. at 2882 (Burger, C.J., dissenting).

ICSP is not a creditor and has filed no claim against the bankruptcy estate. This case is nothing more than a garden-variety dispute between insurer and insured over a claim. The Bankruptcy Code is completely irrelevant to the disposition of the insurance claim. The Policy was a standard one, in no way different from a policy issued to a non-debtor. The underlying claim originates in state law, concerns private contractual rights – like the rights at issue in *Marathon* – and stands completely clear of the "core of the bankruptcy powers." *Marathon*, 458 U.S. at 71.

The only connection of this dispute to Cooper's Chapter 11 plan is that if Cooper's suit is successful, a sum of money would come into the bankruptcy estate. A *Marathon* analysis of whether that fact alone moves a controversy to the very heart of the bankruptcy powers leads quite clearly to one conclusion: it does not. Numerous courts have recognized that such a slight nexus to bankruptcy administration does not confer core bankruptcy jurisdiction.[16] This dispute is not tied to the administration of a

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[16] *See, e.g., Pryor v. Continental Ins. Co. (In re Blue Point Carpet, Inc.)*, 86 Bankr. 327, 328 (Bankr. E.D.N.Y. 1988) ". . . even in the more difficult case where a breach of contract action is necessary to fund a reorganization, treatment of the matter as a core proceeding is still unjustified. . . ." In *Chiodo v. NBC Bank Brooks Field (In re Chiodo)*, 88 Bankr. 780 (W.D. Tex. 1988) the outcome of the action on a note would have obviously "affected" the estate since at issue was one of the largest claims against the estate and liens against much of the property of the estate. Although the creditor had filed a proof of claim, the proceeding was held to be non-core. "The . . . complaint does not invoke any rights provided by Title 11 but asserts only rights under Texas law." *Chiodo* at 782. The possibility that a proceeding will substantially affect a bankruptcy, because money may be recovered and property be unencumbered to pay other creditors and support the reorganization efforts, does not transform

(Footnote continued)

plan. If money is recovered, it will be distributed under the plan, but whether or not there is entitlement to recovery is a far different matter.

B. The Judicially Fashioned Pre-Petition/Post-Petition Distinction Does Not Comport With *Marathon*.

The court of appeals below and the Court of Appeals for the First Circuit (in *Arnold Print Works, Inc. v. Apkin*, 815 F.2d 165 (5th 1987)) confined the *Marathon* holding to pre-petition contracts. *Marathon*, however, extended its holding to traditional state common law actions subject to no federal rule of decision, that are before the bankruptcy court "only because the plaintiff has previously filed a petition for reorganization in that court." *Marathon*, 458 U.S. at 90 (Rehnquist and O'Connor, J.J., concurring in the judgment). The narrow holding of *Marathon* enunciated in the concurring opinion clearly embraces the underlying insurance dispute. *Id.*

The cases restricting the rule of *Marathon* to pre-petition contracts are grounded on one phrase from the opinion in that case: "[A]ppellant Northern's claim for damages and breach of contract and misrepresentation involves a right created by *state* law [emphasis in original], a right independent of and *antecedent to* [emphasis added] the reorganization petition that conferred jurisdiction upon the Bankruptcy Court." 458 U.S. at 84. It was an incident of the suit in *Marathon* that the contract at issue and the action on the contract came into being pre-petition. That incident, however, was not the turning point of the *Marathon* decision. The turning point was the traditional, common-law nature of the claim asserted by the debtor.

The Second Circuit below determined that the underlying suit was "integral to the estate administration" because the insurer had

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the nature of the state law liability suit. *Id.*; *see also, Braucher v. Continental Illinois Nat'l. Bank and Trust Co. of Chicago (In re Illinois-California Exp., Inc.)*, 50 Bankr. 232 (Bankr. D. Colo. 1985). In *Johnson v. State Farm Mutual Automobile Ins. Co. (In re Guenther)*, 65 Bankr. 650 (Bankr. D. Colo. 1986), a bad-faith failure-to-settle suit of trustee against debtor's insurer was deemed non-core, although the potential recovery on the policy was the entire property of the debtor's estate.

knowingly contracted with one who was a debtor in possession; the insurance concerned an estate asset; and adequate insurance had been made a premise of the confirmation of Cooper's reorganization plan. The court of appeals noted that "historically, trustees and debtors in possession. . . have been viewed as officers of the bankruptcy court." A-11.[17]

Bankruptcy confers no special entitlement to insurance coverage nor does it confer special rights under an insurance contract which would create bankruptcy court jurisdiction where none otherwise would exist. The proposition that a contract is not rewritten by the Bankruptcy Code is widely accepted.[18] The court below stated baldly, "Logically, a post-petition contract that has as its subject matter an estate asset must be analyzed differently than one arising pre-petition." A-11. The court below omitted to explain *how* the analysis of a post-petition contract "must differ" from the analysis of a pre-petition contract. The court presents two reasons why the analysis must differ: because with the petition the bankruptcy estate is created and "[m]oreover,. . . the filing date adjusts 'the rights of others connected with the proceeding.' " A-11.[19] These facts provide no answer to the question: how is the post-petition contract – in this instance, the basis of the insurer's liability – to be analyzed differently? This case is like *Marathon* and *Granfinanciera*: state law must determine state-created rights, and then bankruptcy jurisdiction is properly invoked to supervise distribution of proceeds.

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[17] Referring to *Arnold Print Works, Inc. v. Apkin*, 815 F.2d at 169-70.

[18] "[It is a] general principle of bankruptcy law that the Code does not enlarge a party's rights created under state or federal law except to the extent that such expansion is expressly or by necessary implication afforded by the Code. . . . [T]he Code does not augment the rights of a debtor under a contract nor prevent termination of a contract by its own terms." *Heaven Sent, Ltd., v. Centennial Ins. Co. (In re Heaven Sent, Ltd.)*, 50 Bankr. 636, 638 (Bankr. E.D. Pa. 1985).

[19] Quoting King, 4 *Collier on Bankruptcy* ¶ 541.04 at 541-22 (15th ed. 1989).

Cases dealing with pre-petition insurance contract disputes uniformly find them to be non-core matters.[20] There appears to be no distinction between suits based on pre-petition insurance contracts and suits on post-petition contracts which could rise to a constitutional level of significance. The controlling law is in both cases state common law. The parties are private, not governmental entities. Why the post-petition timing of the contract should operate to strip a non-creditor party of an article III entitlement has not been made clear by the court of appeals below or by the First Circuit in *Arnold Prints Works*. It should be borne in mind that, to the extent that these cases rely on jurisdiction permitted under the 1898 Act, the old referee system was never approved by this Court (see n. 8, *supra*).

The core or non-core status of a proceeding must be determined on a case-by-case basis. A bright line should not be drawn at the moment of the filing of the petition. The fact that a bankruptcy court confirms a plan including a general provision for insurance cannot confer jurisdiction on an article I court to render final judgment in a purely state common-law insurance dispute. The reorganization plan's requirement of insurance coverage does not inextricably interweave the standard insurance contract with any federal rule of decision.

A Ninth Circuit decision, *Piombo v. Castlerock Properties (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986), and a Fifth Circuit decision, *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), offer an analysis of the core/non-core distinction which is more persuasive in light of *Marathon* than is the opinion below. The court in *Wood*, presented with a post-petition contract claim, held that core matters are those controversies which "implicate the peculiar rights and powers of bankruptcy or, in Justice Brennan's words, controversies 'at the core of the federal bankruptcy

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[20] *See, e.g., Rosen-Novak Auto v. Honz*, 783 F.2d 789 (8th Cir. 1986); *In re Pied Piper Casuals, Inc.*, 72 Bankr. 156 (S.D.N.Y. 1987); *UNR Industries, Inc. v. Continental Ins. Co.*, 623 F. Supp. 1319 (N.D. Ill. 1985); *Sullivan v. Maryland Casualty Co. (In re Ramex Int'l, Inc.)*, 91 Bankr. 313 (E.D. Pa. 1988); *R.I. Lithograph Corp. v. Aetna Casualty and Surety Co.*, 60 Bankr. 199 (Bankr. D. R.I. 1986); *A.I.A. Industries, Inc. v. Equitable Life Assurance Soc'y (In re A.I.A. Industries, Inc.)*, 75 Bankr. 1013 (Bankr. E.D. Pa. 1987).

power.' " *Wood* at 96. The court went on to state that "controversies that do not depend on the bankruptcy laws for their existence—suits that could proceed in another court even in the absence of bankruptcy—are not core proceedings." *Id.*[21]

Wood examined the language of subsection 157(b)(1) which vests full judicial power in bankruptcy courts over "core proceedings arising under Title 11, or arising in a case under Title 11." Section 157 equates core proceedings with the categories of "arising under" and "arising in" proceedings. The court explained that "arising under" proceedings involve a cause of action created or determined by a statutory provision of title 11. It interpreted "arising in proceedings" as those "administrative" matters that arise *only* in bankruptcy cases. "In other words, 'arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy." *Wood*, 825 F.2d at 97.

The plaintiff in *Wood* had argued that his action was "literally a claim against the estate, which is expressly defined as a core proceeding by section 157(b)(2)(B)." *Id.* at 97. In rejecting this argument, the court explained that to determine the nature of a proceeding, it needed to look to both the form and the substance of the proceeding. The court further indicated that the issue in *Wood* was "whether the defendants are liable to the plaintiff under state law. The suit does not raise as primary issues such matters as dischargeability, allowance of the claim, or other bankruptcy matters." *Id.* at 98. Thus, while the court recognized that final judgment in the contract dispute in *Wood* might lead to proceedings to allow the claim or discharge the debt, those concerns were not "primary issues," but rather speculative and insubstantial. *Id.*

Applying the *Wood* analysis to the present case, Cooper's claim against its insurer concerns liability on a contract under state law. Although the insured is a debtor which is required to maintain

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[21] The *Wood* court's test for core proceedings has been adopted in *Gower v. Farmers Home Administration (In re Davis)*, 899 F.2d 1136, 1140-1141 (11th Cir. 1990); and *Barnett v. Stern*, ____F.2d____, 1990 WL 108866 (7th Cir. Aug. 2 1990). The court in *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1156 (3d Cir. 1989) cited the *Wood* formulation with approval.

insurance as part of its reorganization plan, that connection to the bankruptcy case is inadequate to support final determination by the bankruptcy court. This matter, which does not arise under any provision of Title 11, and is not unique to a bankruptcy context, falls outside the core category.

In *Castlerock*, the controversy was a debtor's state-law contract counterclaim which was originally brought in state court before a proof of claim was filed. The court declined to find core status under § 157(b)(2)(C) ("counterclaims by the estate against persons filing claims against the estate"), on the theory that the proof of claim was filed by the claimant after the state-law contract action had been commenced in state court and removed by the debtor to the bankruptcy court. The court also declined to find core status under either of the catchall provisions, § 157(b)(2)(A) ("matters concerning the administration of the estate"), or § 157(b)(2)(O) ("other proceedings affecting the liquidation of the assets of the estate"). Noting many cases which had held contract claims arguably within those provisions to be non-core, the court emphasized that a core characterization should be avoided if it may raise constitutional problems.

> [T]he apparent broad reading that can be given to § 157(b)(2) should be tempered by the *Marathon* decision. *American Energy*, 50 B.R. at 178.
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> This Circuit has interpreted *Marathon* as depriving the bankruptcy court of jurisdiction "to make final determinations in matters that could have been brought in a district court or a state court." *Thomas*, 765 F.2d at 929.

Castlerock, 781 F.2d at 162.

Wood and *Castlerock* implement the spirit of the *Marathon* decision by restricting core jurisdiction to matters "at the core of the bankruptcy powers"—matters originating in bankruptcy law, or turning on bankruptcy law, which could not have been brought in the first instance in state court. Under a *Wood-Castlerock* analysis, the present insurance dispute is a simple

state-law claim whose connection with the bankruptcy case is, upon examination, peripheral and incidental.

A number of courts have struggled with the seemingly all-encompassing scope of what is "core" under the BAFJA and have recognized that a literal and broad reading which ignores *Marathon* would not be proper. For example, in *A.I.A. Industries, Inc. v. Equitable Life Assurance Soc'y (In re A.I.A. Industries, Inc.)*, 75 Bankr. 1013 (Bankr. E.D. Pa. 1987), the debtor contended that a suit to recover on an insurance policy was a core matter under § 157(b)(2)(A) ("matters concerning the administration of the estate"), (B) ("allowance or disallowance of claims"), (C) ("counterclaims by the estate against persons filing claims against the estate"), and (O) ("other proceedings affecting liquidation"). The court conceded that the wording of certain of these subsections could be read to embrace the proceeding in question.

> However, as we pointed out in *Windsor*, 67 B.R. at 695, a broad reading of the subsections of this statutory provision would result in a conclusion that practically every conceivable proceeding is a core proceeding. Tempting as reaching such a conclusion would be, we cannot agree that such a reading comports with the letter or spirit of *Marathon*, or with the Congressional intent of accommodation with *Marathon* which undoubtedly was an instrumental factor in the enactment of this strange and ambiguous statutory provision. Since this provision was enacted in response to *Marathon*, to conclude that § 157(b)(2) includes virtually everything, would, in the words of Judge Fox, cause us to "overlook the underlying premise of *Marathon* — which is recognition of the constitutional design of separation of powers implicit in Article III [of the Constitution]" *Earle Industries, supra*, 71 B.R. at 923.

Id. at 1018. *See also, Rosen-Novak Auto Co. v. Honz*, 783 F.2d 739 (8th Cir. 1988)(an action by a debtor against an insurer for post-petition breach of an insurance contract was non-core. Timing of contract with respect to petition not noted).

The court in *In re Sokol*, 60 Bankr. 294, 296 (Bankr. N.D. Ill. 1986) found that an action against a debtor for a post-petition breach of contact was a non-core related matter. The court noted:

> The debtor's complaint clearly is based in contract and tort. It involves state law with the only connection to the bankruptcy estate being that if the debtor prevails, the estate will have more assets to distribute to creditors . . . . [citation omitted] The fact that a debtor or estate is the plaintiff does not transform a common law contract and tort action into a turnover proceeding [citation omitted].
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> * * *
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> A matter that arises directly in a bankruptcy case under bankruptcy law is a core proceeding, and a matter that arises under non-bankruptcy law and happens to be of issue in a bankruptcy case merely because of the accidental fact that one of the parties to the dispute is a debtor in the bankruptcy case usually is not a core proceeding. [citation omitted] That is particularly true where, as here, the debtor is the plaintiff asserting a claim against one who asserts no creditor claim in the bankruptcy case.

Id. at 296.

The debtor in *Sokol* had argued, as did Cooper,[22] that the contract dispute was core under subsections (A), (E), and (O) of § 157(b)(2). The court rejected these classifications, and said tersely that the case had nothing to do with the administration of the estate, but merely represented an asset of the debtors. It was not a "turnover proceeding" because the cause of action was not matured, payable on demand, or payable on order. The *Sokol* court concluded that if the catchall provision "O" included the matter at issue, there would be no such thing as a non-core proceeding. All debtors' causes of action would be core proceedings, including Northern Pipeline's action against Marathon Pipe Line Company. The court bluntly and summarily noted: "The fact that the alleged breach here occurred post-petition . . . cannot

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[22] Cooper also argued below that its adversary proceeding was core under (L) "confirmation of plans."

affect the defendant's constitutional right to a determination of the dispute by an Article III court." *Id.* at 297.[23]

The post-petition nature of Cooper's suit does not render it a dispute *concerning* the administration of the estate or a matter arising in a Title 11 case. It arose *during* a Title 11 case, but is in no sense inextricably interwoven with bankruptcy law and procedures – not like, for example, a confirmation of a plan, a proof of claim, an objection to discharge, or a continuance of stay.

C. The Underlying Dispute Concerns Only Private Rights, Which Were Held In *Marathon* To Be Outside The Scope Of Article I Adjudication.

The plurality opinion in *Marathon* examined the history of article I jurisdiction and found that it was confined to three areas: territorial courts, military courts, and adjudication of "public rights." The opinion acknowledged that the boundaries of the public rights area were not susceptible of precise definition (458 U.S. at 69) but noted that precise definition was not necessary for application to the *Marathon* dispute because "a matter of public rights must at a minimum arise 'between the government and others' " *Id.* (citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)). It was clear that the underlying dispute in *Marathon* was not one in which the government was a party. *Thomas v. Union Carbide Agr. Products Co.*, 473 U.S. 568 (1985), held that a "public right" was not limited to a matter arising between the government and others.[24]

The Court's opinion in *Granfinanciera*, however, established that the private rights doctrine expounded in *Marathon* remains a pivotal factor in the analysis of bankruptcy jurisdiction. *Granfinanciera* involved a bankruptcy trustee's right to recover a fraudulent conveyance. The recovery of fraudulent conveyances

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[23] The court in *Stallings v. Kellogg (In re Hudson Oil Co., Inc.)*, 68 Bankr. 735 (D. Kan. 1986) quotes 1 *Collier on Bankruptcy* ¶ 3.01 for the principle that *Marathon* established that Congress cannot empower an article I court to decide state-law *claims*, as opposed to state-law questions. The *source* of the cause of action is determinative.

[24] The Court there held that the public right doctrine may embrace a "private" right closely intertwined with a federal regulatory scheme which Congress is empowered to enact.

is enumerated as illustrative core matter (H) under § 157(b)(2). Nonetheless, *Granfinanciera* firmly held that the fraudulent conveyance suit did not involve a public right:

> . . . *e.g.* where the government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated.

Granfinanciera, 109 S.Ct. at 2795 (quoting *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 458 (1977)). *Granfinanciera* teaches that even matters delineated by the BAFJA as core matters may not be appropriate for final adjudication by an article I court under *Marathon*. Article III considerations were not directly raised in *Granfinanciera* and the Court noted that its holding did not technically answer the article III question. However, the Court's public versus private rights distinction compels the conclusion that the fraudulent conveyance action in that case, and also Cooper's claim here, must be deemed non-core and not susceptible of final article I adjudication.

Granfinanciera is, in fact, dispositive of this appeal. The Court there explained that the seventh amendment right to a jury trial and the article III entitlement to an independent tribunal are congruent. A cause of action which entails one right by necessary implication entails the other. The court of appeals below affirmed ICSP's seventh amendment jury trial right. *Granfinanciera* makes clear that ICSP is entitled to an article III or state-court forum for the trial by jury.

> Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.[25]

Granfinanciera, 109 S.Ct. at 2796.

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[25] It is noteworthy that the *Granfinanciera* opinion goes further, to suggest that even the "restructuring of debtor-creditor relations in bankruptcy" may not be a public right. See n. 11, 109 S.Ct. at 2787-2798.

The Court in *Granfinanciera* held that fraudulent conveyance actions which " 'constitute no part of proceedings in bankruptcy but concern controversies arising out of it' " (quoting *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)) "resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate more than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy *res*. [citation omitted] They therefore appear matters of private rather than public right." *Granfinanciera*, 109 S.Ct. at 2798.[26]

The Court's examination of a fraudulent conveyance in the context of the private rights doctrine confirms that Cooper's suit for insurance proceeds to augment the bankruptcy *res* is not a bankruptcy proceeding but a controversy arising out of it, far removed from the process of ranking creditors which the Court sees as the true "core" of the bankruptcy powers. It is to be emphasized that the fraudulent conveyance action at issue in *Granfinanciera* arose under 11 U.S.C. § 548(a)(2). *Granfinanciera*, 109 S.Ct. at 2788. Further, a fraudulent conveyance action is an enumerated core matter. 28 U.S.C. § 157(b)(2)(H). *A fortiori*, if that action is to be non-core, as concerning a private right, the instant dispute, which does not arise under any provision of Title 11 and is not an enumerated core matter, must be deemed non-core.

The Bankruptcy Code supplies a federal procedural vehicle for dispersing funds garnered under state law. State-law contract rights are not thereby rechristened as congressionally created rights. Congress cannot relegate rights not of its own creation to a non-article III forum. *Granfinanciera*, 109 S.Ct. at 2786. The decision of the court of appeals below has resurrected the results rejected in *Marathon* and *Granfinanciera*, and must be reversed. The underlying insurance dispute is a non-core matter.

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[26] *Granfinanciera* pointed out that there was no evidence that Congress had considered the implications of classifying fraudulent conveyance actions as core proceedings. 109 S.Ct. at 2800.

III. THE BANKRUPTCY COURT IS NOT A NEUTRAL FORUM.

The court of appeals below suggested that by entering into a contract with a debtor in possession, ICSP had contracted with an officer of the bankruptcy court. A-11. That comment serves to highlight why an independent article III court is the only appropriate forum for this dispute. The notion that the bankruptcy court would resolve a dispute involving a party who is an officer of that court reflects the very type of vice which article III was intended to preclude.

By the same token, in its brief in opposition to ICSP's petition for a writ of certiorari (p.4), Cooper noted that the debtor in possession "[operates] under the aegis of [the bankruptcy court's] protection and authority." (quoting *L.A. Clarke and Sons, Inc. v. Bullock Constr., Inc. (In re L.A. Clarke and Sons, Inc.)*, 51 Bankr. 31, 33 (Bankr. D.C. 1985)). Inasmuch as the underlying insurance dispute involves, *inter alia*, an insurance company's claim for rescission, it would be inconsistent with the constitutional right to a fair and neutral forum to submit such an issue for decision to a court which views itself as charged with a congressional mandate to protect the debtor and its estate.

The danger of partiality is acute where the presiding judge lacks life tenure and salary protection. Bankruptcy judges only serve fourteen-year terms. 28 U.S.C. § 152(a)(1). More importantly, all tenure, removal, and salary provisions (*see* 28 U.S.C. §§ 152(e) and 153(a)) are created by statute. Congress, therefore, always has the power to repeal or otherwise modify those provisions. The government-dependent judge is inclined to promote the goals of the statutory scheme he or she is hired to administer. Judges should be charged only with deciding justly and correctly under the law. Precisely these considerations inform the article III requirements for an independent judiciary with life tenure and salary protection.

In addition to furthering the constitutional right of litigants to a neutral forum, article III adjudication of traditional state-law claims advances the structural separation of powers which the Framers of the Constitution strived to achieve. Allowing a

specialized legislative court to adjudicate an ordinary state common law contract claim encroaches on the proper constitutional sphere of article III judges – the exercise of the judicial power of the United States. "A judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *Marathon*, 458 U.S. at 58 (citing *United States v. Will*, 449 U.S. 200, 217-18 (1980)).

The bankruptcy court clearly does not provide the elements necessary to assure the neutral forum guaranteed by article III.[27]

IV. THE STATUTORY REQUIREMENT OF *DE NOVO* REVIEW OF NON-CORE DISPUTES PROHIBITS THE CONDUCT OF JURY TRIALS IN THE BANKRUPTCY COURTS.

The BAFJA provides that non-core matters are subject to *de novo* review in the district courts. In all non-core matters, bankruptcy judges must submit proposed findings of fact and determinations of law to the district courts for entry of final orders. 28 U.S.C. § 157(c)(1). If bankruptcy judges were to conduct jury trials in non-core matters, the resultant findings of fact and rulings of law would be subject to *de novo* review in the district court. Thus, when litigants in non-core adversary proceedings are entitled to trial by jury pursuant to the seventh

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[27] Furthermore, an important goal of Chapter 11 under the bankruptcy code is to allow the debtor to continue to operate its business under a plan that will satisfy its creditors. A necessary component of this policy is encouraging third parties to do business with debtors in possession.

> . . . [T]he purpose of modern bankruptcy law . . . is to encourage the rehabilitation of an honest Chapter 11 entity, rather than to permit that entity to victimize those who attempt to fulfill the purpose of rehabilitation by doing business with the Chapter 11 debtor.

Flint Hills Foods, Inc. v. Von Der Ahe (In re Isis Foods, Inc.), 19 Bankr. 329, 330-331 (Bankr. W.D. Mo. 1982), *aff'd*, 27 Bankr. 156 (D.C. Mo. 1982); *accord Int'l Fabrics Trading Corp. v. Misty Touch, Inc. (In re Misty Touch, Inc.)*, 31 Bankr. 853 (Bankr. S.D.N.Y. 1983); *Turmail v. Yankee Motor Freight, et al. (In re Manwell)*, 62 Bankr. 533 (Bankr. N.D. Ind. 1986).

Clearly, insurers and others would be discouraged from doing business with debtors in possession if to do so means foregoing the opportunity to resolve any disputes in an article III or state court.

amendment, a second jury trial would necessarily take place in the district court. The concept of two jury trials under such circumstances, however, is unacceptable.

There are two reasons that a second jury trial may not take place. First, as many courts have reasoned, it would be a significant waste of already stretched judicial resources, with absolutely no purpose, to conduct two jury trials, one in the bankruptcy court and a second in the district court. Since the petitioners here are entitled to a trial by jury, the Court could find that reference of this non-core dispute was properly withdrawn from the bankruptcy court, for efficiency reasons, without even reaching the question of a bankruptcy court's empowerment to conduct jury trials, and the concomitant article III proscriptions. Second, and of even greater significance, the seventh amendment prohibits such re-examination of a jury's findings of fact. There is, therefore, a significant constitutional prohibition as to the conduct of two jury trials which provides an independent, valid ground for withdrawal of this non-core matter.

A. Petitioners Are Entitled To A Jury Trial In This Dispute.

The issue of petitioners' right to trial by jury is not before the Court in this case. The Second Circuit below found that petitioners were entitled to trial by jury. A-22. The respondent did not file a cross-petition for certiorari to bring before this Court the portion of the decision below that held that petitioners were entitled to a jury trial. Respondent, therefore, has conceded this point. The proposition is, indeed, indisputable.

The United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. Const. amend. VII. As this Court held in *Granfinanciera*, Congress may not strip litigants of their seventh amendment right to trial by jury merely by placing adjudication of certain matters in an article I forum. *Id.* at 2800.

The Court's holdings in *Granfinanciera* and *Marathon* support petitioners' right to a jury trial. In suits involving legal issues, as opposed to actions seeking only equitable remedies,

litigants are entitled to a trial by jury. *Granfinanciera*, 109 S.Ct. at 2790, n. 4. In *Marathon*, the Court held that where the defendant sought damages for breach of contract and misrepresentation, such claims were "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 [calling for] the traditional common-law mode of judge and jury." 458 U.S. at 90 (Rehnquist, J., concurring in the judgment).

Respondent Cooper's complaint in the Adversary Proceeding alleges, *inter alia*, breach of contract and negligence claims, and seeks money damages. In its answer to the complaint, ICSP raised several affirmative defenses, including breach of contract and misrepresentation. Clearly these are legal claims under *Marathon*.

The court of appeals below correctly determined that the petitioners, having made timely demand therefor, are entitled to a jury trial, reasoning that when an insurer's liability under an insurance policy has matured, the underlying issues to be resolved are legal, not equitable. A-17. The court of appeals found the claims of co-petitioner KC "even more compelling" with regard to this issue. "It is difficult to imagine a claim that is more inherently legal" than one in which respondent seeks damages from petitioner KC for alleged negligence and malpractice. A-18.

In its recent pronouncement in *Granfinanciera*, the Court squarely held that the right to a jury trial could not be eliminated simply because the action was in the bankruptcy court, traditionally a court of equity.

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, 109 S.Ct. at 2800 (citing Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967, 1022-25 (1988) (hereinafter "Gibson, *Jury Trials*")); *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) ("legal claims are not magically converted into equitable issues by their presentation to a court of equity").

By failing to cross-petition, Cooper has conceded that petitioners are entitled to a jury trial. Moreover, following *Granfinanciera* and the precedents upon which that decision is based, the petitioners are clearly entitled to a jury trial in this dispute.

B. Conduct Of A Second Jury Trial In The District Court Is A Waste Of Judicial Resources.

Non-core proceedings in a bankruptcy court are subject to *de novo* review in the district court. Pursuant to 28 U.S.C. § 157:

> (c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgement shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Notwithstanding that § 157(c)(1) grants a bankruptcy judge the power to hear a non-core proceeding, that court's proposed findings must be submitted to the district court for a *de novo* review. In a case that is to be tried by a jury in the bankruptcy court, the right to *de novo* review and seventh amendment considerations would lead to a second jury trial. The resulting waste of judicial resources has led the lower courts to the reasonable conclusion that bankruptcy judges should not conduct jury trials in non-core proceedings.

> . . .[T]his court believes that the line of cases which hold that, regardless of whether the bankruptcy judge is constitutionally or statutorily empowered to conduct a jury trial, it would not be in the interest of judicial economy to permit a bankruptcy judge to conduct jury trials. [This] is the proper conclusion in light of the confusion surrounding the bankruptcy judge's power to conduct jury trials.

Acolyte Elec. Corp. v. City of New York, 69 Bankr. 155, 184 (Bankr. E.D.N.Y. 1986), *aff'd*, 1987 WL 47763 (E.D.N.Y. 1987); *accord Newman Brewing Co., Inc. v. Schmidt and Sons, Inc. (In re Newman Brewing Co., Inc.)*, 87 Bankr. 236, 239 (Bankr. N.D.N.Y. 1988)(where a jury trial was demanded in non-core proceeding, "no purpose would be served in having the bankruptcy court serve as a proposed fact finder as outlined in § 157(c)").

Thus many bankruptcy courts have concluded—without reaching the constitutional implications of an article I judge's conducting a jury trial—that non-core matters may not be tried to a jury in the bankruptcy court.

C. A Second Jury Trial In The District Court Violates The Seventh Amendment To The Constitution.

Even though the resulting waste of judicial resources is a sufficient ground to withdraw reference of this non-core matter from the bankruptcy court's jurisdiction, the constitutional prohibition against re-examination of a jury's findings of fact stands as a significant independent ground.

The seventh amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." In cases involving the adjudication of private rights, an appellate court cannot review *de novo* a jury's finding of fact. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933); *Capital Traction Co. v. Hof*, 174 U.S. 1, 9 (1899); *United States v. Johnson*, 327 U.S. 106, 111 (1946). *See generally* Moore, 5 *Moore's Federal Practice* ¶ 38.05 [5.-7] (2d ed. 1988); 6 *Moore's Federal Practice* ¶ 59.08[6]. Since § 157(c)(1) requires *de novo* review of non-core proceedings in the district courts, the statute would be incompatible with the seventh amendment's restrictions on reexamination of jury findings if the trial were to take place in the bankruptcy court. The lower courts that have found themselves required to address this issue have recognized the anomaly and have concluded that a non-core jury trial cannot take place in the bankruptcy court.

> If, pursuant to the provisions of the Seventh Amendment, the district court may not conduct a second jury

> trial (no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to the rules of the common law), the district court will obviously not be able to fulfill its Article III responsibility and its statutory duty (28 U.S.C. § 157(c)(1)) to review *de novo* a bankruptcy judge's proposed findings of fact and conclusions of law.
>
> In the absence of specific statutory authority, the bankruptcy court should not engender such constitutional conflicts by conducting jury trials in any non-core proceeding.

Hughes-Bechtol, Inc. v. Air Enterprises, Inc. (In re Hughes-Bechtol, Inc.), 107 Bankr. 552, 571 (Bankr. S.D. Ohio 1989). As noted by the Honorable Conrad K. Cyr, formerly Chief Judge of the United States District Court for the District of Maine and currently Circuit Judge for the Court of Appeals for the First Circuit, "it seems *inescapable* that *Hof* precludes a *second* jury trial at the option of the district court." Cyr, *The Right To Trial By Jury In Bankruptcy: Which Judge Is To Preside?*, 63 Am. Bankr. L.J. 53, 60 (1989)(emphasis in original)(footnotes omitted).

Petitioners have not taken any action which would give rise to an inference of consent to the bankruptcy court's jurisdiction. Petitioners recognize that if they had consented, for example, by filing a proof of claim in the bankruptcy court or by failing to object to the court's jurisdiction, they might be barred from contesting jurisdiction at this point. *Granfinanciera*, 109 S.Ct. at 2799; *Novak v. Lorenz (In re Novak)*, ____ Bankr.____, 1990 WL 97804 (N.D. Ill. June 18, 1990). In view of the fact, however, that petitioners have objected to the bankruptcy court's jurisdiction from the outset and have filed no claim against the bankruptcy estate, consent is not an issue.

Since the nature of this contract dispute is such that it is clearly non-core, that is, not for plenary adjudication in the bankruptcy courts pursuant to *Marathon* and *Granfinanciera*, it is not appropriately tried to a jury in an article I court subject to *de novo* review.

V. CONGRESS DID NOT INTEND THAT BANKRUPTCY JUDGES WOULD CONDUCT JURY TRIALS.

Independent of the seventh amendment considerations, the BAFJA and its legislative history reveal no basis for bankruptcy judges' authority to conduct jury trials. There is no statutory provision empowering article I bankruptcy judges to conduct jury trials in adversary proceedings. Likewise, there is no indication that Congress intended that jury trials would take place in the bankruptcy courts under the BAFJA. The authority of article I judges to conduct jury trials certainly is not inherent and cannot be implied. If Congress had attempted to empower bankruptcy judges to conduct jury trials, it would violate article III and the separation of powers doctrine.

A. Bankruptcy Judges Are Not Empowered By Statute To Conduct Jury Trials.

Clearly, there is no authority under the BAFJA for the conduct of jury trials in the bankruptcy courts. Congress did not include any provision empowering article I bankruptcy judges to conduct jury trials when the Bankruptcy Code was reconstituted following *Marathon*. The court below recognized the "lack of a specific statutory provision" for conduct of jury trials under the Bankruptcy Code. A-19. In *In re United Missouri Bank of Kansas City*, 901 F.2d 1449 (8th Cir. 1990), the Eighth Circuit made the same observation as to the lack of a specific provision. "The language of the 1984 Act does not grant jury trial authority." *Id.* at 1454. That court went on to find that no such authority could be implied "especially where congressional and historical support for that authority is lacking." *Id.* at 1456. The Eighth Circuit cautioned against reaching too far to find implied authority merely because Congress sought "to introduce a more efficient bankruptcy scheme." *Id.* Indeed, this Court has noted that there is an issue as to whether Congress could make such an empowerment without running afoul of article III and the separation of powers doctrine.[28]

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[28] "Nor need we decide whether, if Congress has authorized bankruptcy courts to hold jury trials in [fraudulent conveyance] actions, that authorization comports with Article III when non-Article III judges preside over them subject to review in or withdrawal by the district courts." *Granfinanciera*, 109 S.Ct. at 2794-95.

Background

Under the 1898 Act the district court retained jurisdiction over all bankruptcy matters, referring those matters over which the bankruptcy "court" had summary jurisdiction to "referees." Plenary suits, *e.g.*, those in which summary jurisdiction did not exist, were adjudicated either in district courts or state courts. In disputes before the bankruptcy referees, jury trials were not held. Thus district judges, not bankruptcy referees, presided over trials involving or related to bankruptcy proceedings. *See* Gibson, *Jury Trials*, at 971-72, and accompanying notes.

Following enactment of the 1978 Act, the bankruptcy court relied on § 1480 for its authority to conduct jury trials.[29] See 1 *Collier on Bankruptcy*, ¶ 3.01 [7][a] (15th ed. 1989) (1990 Supp.). Although *Marathon* declared the broad grant of jurisdiction to the bankruptcy court in the 1978 Act unconstitutional, the Court did not expressly hold that an article I judge, without the "essential attributes of judicial power," was prohibited from conducting jury trials under any circumstances. Thus after the *Marathon* decision there was confusion among the courts concerning whether jury trials could be conducted in the bankruptcy courts. *See, e.g.*, *Cameron v. Anderson (In re American Energy)*, 50 Bankr. 175, 181 (Bankr. D.N.D. 1985) and *Terry v. Proehl (In re Proehl)*, 36 Bankr. 86, 87 (W.D. Va. 1984)(unconstitutional for non-article III bankruptcy judges to hold jury trials); *McCormick v. American Investors Management, Inc. (In re McCormick)*, 67 Bankr. 838, 843 (D. Nev. 1986), *In re O.P.M. Leasing Services, Inc.*, 48 Bankr. 824, 828-29 (S.D.N.Y. 1985) and *Walsh v. Long Beach Honda (In re Gaildeen Industries, Inc.)*, 59 Bankr. 402, 406-07 (N.D. Cal. 1986)(constitution does not prohibit jury trials in bankruptcy courts); *see also* Gibson, *Jury Trials*, at 986-89.

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[29] 28 U.S.C. § 1480 is no longer in effect (*see* 28 U.S.C.A. § 1480 (West Supp. 1990)). Its provisions resembled the current § 1411 in part.

> § 1480. (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11, that is provided by any statute in effect on September 30, 1979.
>
> (b) The bankruptcy court may order the issues arising under section 303 of title 11 to be tried without a jury.

The Model Emergency Rule, drafted by the Judicial Conference of the United States, was designed as a stop-gap measure to keep the bankruptcy system running while Congress "enact[ed] appropriate remedial legislation in response to . . . *Marathon*." The rule prohibited bankruptcy courts from conducting jury trials. Model Emergency Rule (a) and (d)(1)(D) (West pamphlet 1983), reprinted in 1 *Collier on Bankruptcy* ¶ 3.01 (1)(b)(vi)(15th ed. 1985). "While *Marathon* cast severe doubt on the [jury trial] issue, the subsequently adopted Model Emergency Rule contained an unambiguous prohibition on the conducting of jury trials by bankruptcy judges." Sabino, *Jury Trials in the Bankruptcy Court: The Controversy Ends*, 93 Com. L.J. 238, 239 (1988). Although the majority of bankruptcy court judges who considered the constitutionality of the Emergency Rule found it unconstitutional, it was upheld by every circuit court which considered its validity. 1 *Collier on Bankruptcy*, *supra*, at 3-19, n. 22; Ferriell, *Constitutionality of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 63 Am. Bankr. L.J. 109, 121, n. 79 (1989).

Yet when the Bankruptcy Amendments were enacted in 1984, there was no provision which addressed the jury trial issue. The "notoriously ambiguous"[30] § 1411 of the BAFJA is the only provision of the current statute that even makes reference to jury trials. Subsection (a) appears to preserve "any right to trial by jury [in] a personal injury or wrongful death tort claim" and directs that such jury trials be held in the district courts; subsection (b) appears to grant the district court the right to deny jury trials in hearings on involuntary petitions. *Id.* Thus the only section of the BAFJA that expressly addresses the question of jury trials, provides that such jury trials be conducted in the district courts.

Current Statutory Provisions

Notwithstanding that there is no provision under the BAFJA empowering bankruptcy judges to conduct jury trials, some courts have clung to the belief that bankruptcy judges still possess that statutory power: *See, e.g., In re Gaildeen Industries, Inc.*, 59

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[30] *See Granfinanciera*, 109 S.Ct. at 2789, n. 3.

Bankr. at 404-5 (N.D. Cal. No. 1986); *Baldwin-United Corp. v. Thompson (In re Baldwin-United Corp.)*, 48 Bankr. 49, 56 (S.D. Ohio 1985). Several courts have relied upon 28 U.S.C. § 1411 and the now repealed Bankruptcy Rule 9015 to "infer" the jury trial power. *See, e.g., In re McCormick*, 67 Bankr. at 843 (D. Nev. 1986). As discussed below, these courts' conclusions are not well grounded.

Rule 9015, which merely provided procedural guidelines for demanding a jury trial in bankruptcy proceedings, was enacted on April 25, 1983, pursuant to 28 U.S.C. § 2075. When the jurisdictional grant under the 1978 Act was declared unconstitutional by the Court in *Marathon*, and the BAFJA was subsequently enacted, the old Rule 9015 remained as a vestige of the 1978 Act, even though § 1480, the pre-*Marathon* basis for jury trials in bankruptcy court, had been eliminated. In its initial recommendations to the Judicial Conference, the Advisory Committee on Bankruptcy Rules did not see any need to amend Rule 9015 after the BAFJA "[b]ecause Rule 9015 only dealt with the method of requesting a jury trial not the right to a jury trial or the power of a bankruptcy judge to conduct a jury trial . . ." 107 F.R.D. 413, 418 (1985). Apparently, because some courts continued to rely on Rule 9015 as a basis for conducting jury trials in bankruptcy courts after the BAFJA, the rule was repealed in 1987.[31] This should have settled any doubts concerning statutory authorization of jury trials in bankruptcy courts under the BAFJA. *See generally* Sabino, *Jury Trials*. Certainly, after repeal of Rule

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[31] In a letter from the Advisory Committee on Bankruptcy Rules to the Hon. Edward T. Gignoux, Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference dated June 23, 1986, there is the following:

> Former § 1480 of title 28 preserved a right to trial by jury in any case or proceeding under title 11 in which jury trial was provided by statute. Rule 9015 provided the procedure for jury trials in bankruptcy courts. §1480 was repealed. § 1411, added by the 1984 amendments, affords a jury trial only for personal injury or wrongful death claims, which 28 U.S.C. §157(b)(5) requires be tried in the district court. Nevertheless, Rule 9015 has been cited as conferring a right to jury trial in other matters before bankruptcy judges. In light of the clear mandate of 28 U.S.C. § 2075 that the 'rules shall not abridge, enlarge, or modify any substantive right,' the Advisory Committee abrogated Rule 9015.

114 F.R.D. 193, 215 (1986).

9015 based upon the Advisory Committee's rationale, there can be no question as to the absence of statutory empowerment for the conduct of jury trials under the BAFJA.

B. There Is No Evidence That Congress Contemplated Jury Trials In The Bankruptcy Courts Under The BAFJA.

A thorough review of the legislative history of the BAFJA, as well as the language of the statute itself, reveal that Congress did not intend for bankruptcy judges to conduct jury trials. The prior statutory authority providing for jury trials in the bankruptcy courts under the 1978 Act, 28 U.S.C. § 1480, has been effectively repealed, *see* n. 31, *supra*. *See also* King, *Jurisdiction and Procedure under the Bankruptcy Amendments of 1984*, 38 Vand. L. Rev. 675, 678 (1985). There is virtually no discussion in the congressional record regarding this issue.[32] The fragmented statements in the legislative history that do address the old § 1480 and the new § 1411 are contradictory—Congress's intent cannot be gleaned. *See* Gibson, *Jury Trials*, at 991-996; *In re United Missouri Bank*, 901 F.2d at 1455 n. 16.

Some courts have attempted to draw a negative inference from § 1411. These courts have reasoned that because § 1411 expressly assigns conduct of jury trials in wrongful death and personal injury actions to the district court, jury trials in all other actions can be conducted in the bankruptcy courts. Such reasoning is logically flawed. No negative inference can be drawn from § 1411 because article I powers cannot be implied. *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899); *see also In re United Missouri Bank*, 901 F.2d at 1454-55.

In fact, the exact opposite inference can be drawn from Congress's enactment of § 1411. Had Congress believed that bankruptcy courts were empowered to conduct jury trials, it would not

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[32] In *Lerblance v. Rodgers (In re Rodgers & Sons, Inc.)*, 48 Bankr. 683 (Bankr. E.D. Okla. 1985), the court relied in part upon comments made by Senators Dole and DeConcini concerning Congress's intent vis-a-vis § 1411(a) and jury trials in an interview following enactment of BAFJA. As noted in 1 *Collier Bankruptcy Manual*, ¶ 3.01 [7][b][i] at 3-99, n. 172, these comments can hardly "be taken to constitute legislative history."

have created a procedure whereby personal injury and wrongful death claims would be tried by juries in the district courts. If anything, this evidences a recognition on Congress's part that jury trials should not be conducted in the bankruptcy courts. Congress simply knew, following *Marathon*, that to permit jury trials in bankruptcy courts encroached into the judiciary's purview and would violate article III.

VI. THE CONDUCT OF JURY TRIALS BY ARTICLE I BANKRUPTCY JUDGES VIOLATES ARTICLE III OF THE CONSTITUTION.

There is a fundamental constitutional prohibition against an article I bankruptcy judge's presiding over jury trials in ordinary state law disputes. The *Granfinanciera* Court recognized that the seventh amendment right is congruent with the right to an article III forum. The bankruptcy courts, which today handle a broad range of matters, including many ordinary state-law disputes, are not an appropriate exception to the proscriptions that article III imposes upon legislative courts established by Congress pursuant to its article I powers. Those exceptions all involve narrowly defined specialty "courts" that are wholly different from the bankruptcy courts.

A. The Seventh Amendment Right To Trial By Jury Is Concomitant With The Right To Adjudication In An Article III Forum.

Contrary to the Second Circuit's opinion below, the *Granfinanciera* decision does not expressly sanction the conduct of jury trials by article I bankruptcy judges. In that recent opinion, in fact, the Court expressly left open the question of which forum is appropriate for the exercise of the seventh amendment right which it upheld. *Granfinanciera*, 109 S.Ct. at 2802. A careful analysis of the opinion, coupled with what this Court said in *Marathon* leads to one conclusion: bankruptcy judges cannot conduct jury trials.

Although a majority of the *Marathon* Court did not agree with all aspects of Justice Brennan's plurality opinion, a majority

did agree that an action for breach of contract arising under state law cannot properly come "before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that court." *Marathon*, 458 U.S. at 90 (Rehnquist, J. concurring in judgment). "It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon." *Id.* at 87, n. 40. Yet under the new bankruptcy scheme which was ostensibly designed by Congress to solve the constitutional infirmities highlighted in *Marathon*, the same situation has arisen and comes before this Court.

The Court's mandate was that "Congress . . . determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III." Many legal scholars have expressed the view that Congress did not succeed. *See, e.g.*, King, *Jurisdiction and Procedure, supra* at 678; Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, The Judicial Conference, and the Legislative Process*, 22 Harv. J. on Legis. 1 (1985). Yet, one can give proper meaning and effect to the BAFJA in a manner that is consonant with *Marathon* and in keeping with constitutional considerations. *See* discussion in Points I and II, *supra*.

Concomitant with the seventh amendment right to a jury trial is the right of adjudication before an article III tribunal.

> Congress' power to [assign resolution of claims it creates to forums where jury trials are not available] is limited, however, just as its power to place adjudicative authority in non-Article III tribunals is circumscribed. . . . Indeed, our decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal. *For if a statutory cause of action, such as respondent's right to recover a fraudulent*

> *conveyance . . . is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power."*

Granfinanciera, 109 S.Ct. at 2796 (citations omitted) (emphasis added). The Court went on to conclude that the converse holds true. If an action can properly be committed by Congress to adjudication in a non-article III tribunal (presumably an action involving "public rights"), then the seventh amendment "poses no independent bar to the adjudication of that action by a non-jury factfinder." *Id.*

As discussed in Point II, *supra*, the case at bar, however the dispute might be characterized under the BAFJA, involves only private contract rights between individuals. It does not "arise between the Government and persons subject to its authority" as public rights were defined in *Granfinanciera*. The Court concluded in *Granfinanciera* that the fraudulent conveyance claims were private. Congress therefore could not strip the petitioners of their seventh amendment jury trial right. Since the Court stated that the seventh amendment right is concomitant with Article III adjudication, the only possible conclusion is that the bankruptcy power, insofar as state-created, "private" causes of action are concerned, cannot be used by Congress to restrict article III rights. Thus clearly Congress's power to place adjudicative authority over petitioners' state law claims in the non-article III bankruptcy court is circumscribed. *See Granfinanciera*, 109 S.Ct. at 2796.

Given the Court's finding in *Granfinanciera* that a fraudulent conveyance action "was not integrally related to the reformation of debtor-creditor relations," *id.* at 2800, petitioners' ordinary state-law claims for breach of contract and misrepresentation, and respondent's negligence claims – which fall even further from the "core" of bankruptcy proceedings – should most certainly have the full benefit of seventh amendment guarantees and article III adjudication.

Petitioners are entitled to a jury trial under the seventh amendment because the rights involved are "private" pursuant to

Granfinanciera. If the seventh amendment right is inexorably tied to the right to adjudication in an article III court, as the Court stated in *Granfinanciera*, then the adjudication of petitioners' claims cannot be assigned by Congress to the bankruptcy court, in which an article I judge presides.

B. Allowing Non-Article III Judges To Conduct Jury Trials In Bankruptcy Courts Would Dangerously Erode The Independence Of The Judicial Branch.

The prospect of bankruptcy judges, who sit in the Congressionally-created article I courts, conducting jury trials strikes at the very core of our Constitution. To protect against the tyranny that would result from the accumulation of legislative, executive, and judiciary powers in the same hands,

> the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. . . . The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature – to maintain the checks and balances of the constitutional structure and also to guarantee that the process of adjudication itself remained impartial.

Marathon, 458 U.S. at 57-58. Separation of the three distinct branches lies at the heart of the Constitution's framework. "[O]ur Constitution unambiguously enunciates a fundamental principle – that the 'judicial Power of the United States' must be reposed in an independent Judiciary." *Id.* at 60. Independence of the judiciary continues to be of paramount concern.

Pursuant to article III, the power of the judiciary is vested in the Supreme Court, "and in such inferior Courts as the Congress may from time to time ordain and establish." art. III, §1. "The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III." 458 U.S. at 58-59. Included as necessary attributes of the judiciary are the tenure and salary protections:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const., art. III, § 1. The tenure and compensation clauses ensure an independent judiciary free from control by the other branches of government:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*

Marathon, 458 U.S. at 60 (citing The Federalist No. 79, p. 491 (H. Lodge ed. 1888)(A. Hamilton)(emphasis in original)); *see also id.* at 59-60, n. 10 and 11. Lacking article III, § 1 qualifications, bankruptcy judges cannot exercise article III functions, including the conduct of jury trials.

Although the Court has upheld the right of Congress to delegate some adjudicatory functions to non-article III tribunals, it has done so only in extremely limited circumstances: all of these "exceptions," as discussed below, are clearly distinguishable from the matters at issue in this case. The Court in *Marathon* carefully analyzed and distinguished the three narrow categories of "courts" which constitute exceptions to the article III mandate. Because the "congressional assertion of a power to create legislative courts [in these limited areas] was consistent with, rather than threatening to, the constitutional mandate of separation of powers" 458 U.S. at 64, the Court has upheld the non-article III territorial courts (including the District of Columbia courts), the military courts, and the legislative courts and administrative agencies which adjudicate congressionally created "public rights". *Marathon*, 458 U.S. at 64-69.

C. The Limited Exceptions To The Prohibition Against Vesting Article III Powers In Article I Courts Do Not Justify Conduct Of Jury Trials By Article I Bankruptcy Judges.

Neither the legislative courts, nor administrative agencies, nor the powers of magistrates acting as adjuncts to the district courts are analogous to the bankruptcy courts. The administrative agencies deal with congressionally created rights and pervasive regulatory schemes in specialized areas. The bankruptcy courts, on the other hand, are qualitatively different from any of the administrative agencies. "If Justice Brennan did in fact make the implicit prediction that bankruptcy cases were potential battlegrounds, he has been proven correct. Bankruptcy courts today are where major social policy issues – compensation for victims of asbestosis, toxic waste cleanups, and labor relations – are being played out." Resnik, *The Mythic Meaning of Article III Courts*, 56 U. Colo. L. Rev. 581, 615 (1985). Administrative agencies, such as the E.P.A. in *Thomas v. Union Carbide* or the Commodity Futures Trading Commission in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 883 (1986), promulgate and enforce regulations created by act of Congress. In contrast, bankruptcy judges are not merely adjudicating rights created by Congress as part of a pervasive regulatory scheme or public entitlement. Rather, under the broad construction placed upon the BAFJA by the court below and the First Circuit in *Arnold Print Works*, bankruptcy judges are hearing a range of disputes, many of which are between private litigants over common law claims.

Although the non-article III judges have been delegated authority to conduct jury trials in certain specific instances, those circumstances are not apposite here. As a general rule, findings of federal magistrates are subject to *de novo* review by the district courts. *U.S. v. Raddatz*, 447 U.S. 667, 673-77 (1980). Magistrates may conduct jury trials in a narrow range of matters and only upon express written consent of all parties to a proceeding. 28 U.S.C. §§636(a)(3) and (c). Some cases have held that the written consent requirement satisfies article III limitations upon Congress's power to delegate adjudicatory functions. *Collins v.*

Foreman, 729 F.2d 108 (2d Cir. 1984). In other actions, however consent has not sufficed. *Ford v. Estelle*, 740 F.2d 374 (5th Cir. 1984).[33]

The territorial courts are one historical exception to the article III prohibition on Congress's ability to delegate judicial functions to article I tribunals. In 1828 the Court recognized that article IV § 3 grants sole power to Congress to establish governments in the territories which are not within the states. *American Ins. Co. v. Canter*, 1 Pet. 511 (1828). In fact, the *Canter* decision has been blamed for opening the door to numerous difficult constitutional questions.[34] The same rationale was applied to uphold the District of Columbia non-article III courts. *Kendall v. United States*, 12 Pet. 524 (1838); *see* discussion in *Marathon*, 458 U.S. 64-65. Today, "territorial" article IV courts include courts in the United States territories, for example, Guam and the Virgin Islands. *Id.* These courts are limited in number; they serve specific purposes. The District of Columbia Courts, while established pursuant to powers granted to Congress under article I, are anomalous. Those courts are really most like the state courts because Congress is granted the sole power to establish the government and laws within the District.

There is little danger of Congress's usurping the role of the article III courts by the exercise of its power through the narrowly carved exceptions for the territorial or legislative courts. Furthermore, whereas legislative courts and administrative agencies are specialized, matters which arise in the bankruptcy courts represent the full range of civil litigation. All varieties of contract, negligence, and commercial law matters would be tried by article I judges if the bankruptcy courts were allowed to conduct jury trials. The threat of significant erosion of article III is great.

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[33] It should be noted that the Court has not decided the constitutionality of a magistrate's conducting a jury trial upon consent of the parties.

[34] "Justice Marshall's opinion in *Canter* opened a Pandora's box that has, on numerous occasions, required the Court to determine the limits of the powers of such tribunals in a way that preserves their efficacy while at the same time imposes meaningful restrictions upon Congress' ability to delegate too much judicial power to courts whose judges lack the protections and thus the independence that article III was designed to foster." Ferriell, *Constitutionality of the Bankruptcy Amendments to the Federal Judgeship Act of 1984*, 63 Am. Bankr. L.J. 109, 122 (1989) (footnotes omitted).

CONCLUSION

> Congress cannot withdraw from Article III judicial cognizance any matter which from its nature, is the subject of a suit at common law, or in equity or admiralty.

Murray's Lessee v. Hoboken Const. & Improvement Co., 18 How. 272, 284 (1856).

This Court's message to Congress in *Marathon* was unambiguous: article III rights are to be jealously guarded. *Granfinanciera* further emphasized that, however one denominates a claim and notwithstanding that happens to be pending in an article I court, constitutional guarantees will remain paramount.

The manner in which the Second Circuit has applied the BAFJA to the underlying dispute has resurrected the concepts which were rejected in *Marathon* and *Granfinanciera*. Its endorsement of a broad-sweeping article I bankruptcy jurisdiction embracing state common-law disputes involving private rights, poses a threat to article III. If anything is clear from *Marathon* and its progeny, it is that article III guarantees must be safeguarded.

For the foregoing reasons, the judgment of the court below that this is a core proceeding and that the jury trial may be conducted in the bankruptcy court should be reversed and the ruling of the district court should be reinstated.

Respectfully submitted,

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August 20, 1990

Docket No. 89-1784

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CLERK

In the

Supreme Court of the United States

October Term, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

vs.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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September 28, 1990

PETITION FOR CERTIORARI FILED MAY 8, 1990
CERTIORARI GRANTED JUNE 25, 1990

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a bankruptcy court has core jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A) over a debtor's adversary proceeding where the contract in dispute was both knowingly entered into with a debtor-in-possession after the filing of the bankruptcy petition and was mandated by the debtor-in-possession's plan of reorganization.

II. Whether a bankruptcy court has the statutory and constitutional authority to conduct a jury trial in a core proceeding.

RULE 29.1 STATEMENT

Respondent has no parent companies nor any subsidiaries which are not wholly-owned subsidiaries.

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Docket No. 89-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

VS.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

The respondent, Ben Cooper, Inc. ("Ben Cooper"), respectfully prays that the opinion and order of the United States Court of Appeals for the Second Circuit, entered on February 7, 1990, be affirmed.

The decision of the Second Circuit – holding that Ben Cooper's adversary proceeding seeking relief under a post-petition insurance contract is a core proceeding and that the bankruptcy court has both the statutory and constitutional authority to conduct a jury trial in a core proceeding – is well supported by judicial authority and is consistent with the fundamental goal of federal bankruptcy law to efficiently and expeditiously rehabilitate a debtor.

OPINIONS BELOW[1]

The oral opinion and order of the District Court for the Southern District of New York (Stanton, D.J.), from which the appeal to the United States Court of Appeals for the Second Circuit was taken, has not been reported. It is reprinted at J.A. 183.[2]

The oral opinion and order of the United States Bankruptcy Court for the Southern District of New York (Blackshear, B.J.) determining that the adversary proceeding is core has not been reported. The transcript of the hearing in which the ruling appears is reprinted beginning at J.A. 83. The ruling itself appears at J.A. 112-113.

COUNTER-STATEMENT OF THE CASE

Ben Cooper is a manufacturer and importer of toys and related products, specializing in halloween costumes. In April 1988, Ben Cooper filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code. During the course of the bankruptcy proceedings, Ben Cooper was required to obtain new insurance for its facilities. Ben Cooper enlisted insurance broker Kalvin-Miller International, Inc. ("K-M") who, in turn, enlisted broker Kerwick & Curran, Inc. ("KC") to procure the necessary insurance. Both K-M and KC knew that Ben Cooper was operating as a debtor-in-possession under the bankruptcy laws.

In October 1988, Ben Cooper, through K-M and KC, obtained insurance coverage for its facilities from petitioner The Insurance Company of the State of Pennsylvania ("ICPA"), which was also

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[1] The joint appendix page references in the Brief for the Petitioners for two of the opinions below are incorrect and are repeated herein pursuant to Rule 24.2 of this Court.

[2] Reference to "J.A.____" followed by a page number indicates a reference to the Joint Appendix submitted by petitioners.

fully aware that it was dealing with a debtor-in-possession. In January 1989, Ben Cooper suffered a fire loss at one of its insured facilities and, in accordance with its insurance policy, filed a claim with ICPA.

Shortly thereafter, in connection with its ongoing reorganization, Ben Cooper submitted its plan of reorganization (the "Plan") to the Bankruptcy Court (J.A. 145). Among other provisions, the Plan specifically required that Ben Cooper "keep all of its properties adequately insured with responsible insurance carriers against loss or damage by fire or other hazards." (J.A. 156-157).[3]

On April 4, 1989, the Bankruptcy Court issued its order confirming Ben Cooper's Plan (which provided for 100% payment to creditors). The Plan was confirmed on the assumption that Ben Cooper had "proper insurance" in place (J.A. 162). Two weeks later, ICPA commenced an action in New York State court seeking rescission of Ben Cooper's insurance coverage and a declaration that the insurance coverage was void from its inception.[4]

Ben Cooper then commenced its adversary proceeding in the Bankruptcy Court against ICPA, K-M and KC seeking a declaration that the insurance coverage was in effect and that it covered the loss. Ben Cooper sought payment for the loss, believed to be in excess of $2,000,000. Damages were sought, in the alternative, against K-M and KC if it were determined that the insurance coverage had not been properly obtained by them (J.A. 132).

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[3] Petitioners completely omit reference to the Plan and its express requirement for insurance, despite the fact that the Second Circuit specifically noted this requirement and relied on it in holding that the adversary proceeding was core.

[4] Petitioners incorrectly state as fact that which is at the heart of the underlying factual dispute between the parties, namely, whether the nature of Ben Cooper's operations (specifically with respect to the facility which suffered the fire loss) was disclosed to ICPA. Ben Cooper contends that ICPA was fully aware that its insured facilities included manufacturing operations. ICPA contends that it was not.

On Ben Cooper's motion, the Bankruptcy Court enjoined the prosecution of the action ICPA had commenced in state court (J.A. 37). After this initial ruling, petitioners (together with K-M) moved in the United States District Court for withdrawal of the reference to the Bankruptcy Court. The District Court (Walker, D.J.) ruled that the motion was premature and remanded the matter to the Bankruptcy Court for a core/noncore determination pursuant to 28 U.S.C. § 157(b)(3) (J.A. 68). The Bankruptcy Court then ruled that the adversary proceeding was a core proceeding under at least two provisions of 28 U.S.C. § 157(b)(2) – subsection (A), "matters concerning the administration of the estate", and subsection (L), relating to "confirmation of plans" (J.A. 87).

Petitioners then moved the District Court seeking reversal of the core determination, establishment of its right to a jury trial, dissolution of the injunction and withdrawal of the reference. In a decision read in open court, the District Court (Stanton, D.J.) reversed the Bankruptcy Court's determination that the proceeding was core, ruled that petitioners were entitled to a jury trial on some of the issues raised, vacated the injunction and withdrew the reference (J.A. 183).

Ben Cooper appealed the District Court's decision to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed the District Court and held that the proceeding was core, agreed that petitioners were entitled to a jury trial and ruled that the Bankruptcy Court was both statutorily and constitutionally empowered to conduct the jury trial. *In re Ben Cooper, Inc.*, 896 F.2d 1394 (2d Cir. 1990). The Second Circuit remanded the proceeding to the Bankruptcy Court.

Petitioners[5] filed a petition for certiorari, which was granted June 28, 1990.

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[5] K-M did not join in the petition and is not a party to this appeal.

SUMMARY OF ARGUMENT

I. The Second Circuit held that the adversary proceeding commenced by Ben Cooper, based on a post-petition contract knowingly entered into with the debtor-in-possession, is a core proceeding. The holding is consistent with this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) ("*Marathon*") and with the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA") – which was Congress' response to *Marathon*.

When this Court, in *Marathon*, invalidated the then existing statutory scheme, it found that the Bankruptcy Reform Act of 1978 had impermissibly granted the essential attributes of the judicial power to a non-Article III Court. To remedy this defect, Congress enacted BAFJA, which distinguished between "core" proceedings, which non-Article III courts could "hear and determine", and "noncore" or "related" proceedings, the ultimate determination of which was reserved to the Article III district courts.

The legislative history of BAFJA indicates that Congress intended that the bankruptcy court's "core" jurisdiction be pressed to its constitutional limits. Thus, the Second Circuit held that this adversary proceeding was core under 28 U.S.C. § 157(b)(2)(A) – matters concerning the administration of the estate – because, *inter alia*, the insurance coverage in dispute was a requirement of the debtor's plan of reorganization, and the petitioners knowingly contracted with a debtor-in-possession.

The Second Circuit found that the timing of the dispute – arising from a post-petition contract – differentiated this case from *Marathon* and made this proceeding intrinsic to estate administration.

This decision (and the BAFJA statutory scheme) satisfies the constitutional mandate of *Marathon*, as the adjudication of traditional state law claims which are only peripherally related to bankruptcy will remain in Article III courts while claims at the "core" of bankruptcy will be reserved for the bankruptcy courts.

II. The Second Circuit also held that a bankruptcy court may conduct a jury trial. This conclusion, which this Court discussed but did not decide in *Granfinanciera, S.A. v. Nordberg*, ____U.S.____, 109 S.Ct. 2782 (1989) (*"Granfinanciera"*), is well supported by statutory and constitutional authority, as well as by policy considerations.

In light of *Granfinanciera*, the only consistent reading of the statutory scheme requires that bankruptcy courts be permitted to conduct jury trials. To eliminate this authority would do violence to the statutory scheme pursuant to which the bankruptcy court was empowered to "hear and determine" core proceedings. This conclusion finds support in the current statutory provisions, as well as in the legislative history.

With respect to constitutional authority, it is clear that neither the Seventh Amendment nor Article III would preclude the conduct of a jury trial in bankruptcy court. Seventh Amendment jury trials have been sanctioned in non-Article III courts and *Marathon* did not prohibit jury trials in the bankruptcy courts.

Finally, jury trials in bankruptcy courts are supported by policy concerns. It is well-settled that all bankruptcy matters should be handled within the context of one proceeding. Removing discrete parts of a bankruptcy proceeding from the bankruptcy courts because of the necessity of a jury trial would hamper the efficient operation of the bankruptcy system and would further overcrowd the district courts.

I

THE BANKRUPTCY COURT HAS CORE JURISDICTION PURSUANT TO 28 U.S.C. § 157(b)(2)(A) OVER THE ADVERSARY PROCEEDING AS THE CONTRACT IN DISPUTE WAS BOTH KNOWINGLY ENTERED INTO WITH A DEBTOR-IN-POSSESSION AFTER THE FILING OF THE BANKRUPTCY PETITION AND WAS MANDATED BY THE DEBTOR-IN-POSSESSION'S PLAN OF REORGANIZATION

A. *Introduction*

The Second Circuit's decision that Ben Cooper's adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A) is a holding consistent with a long line of cases interpreting this Court's landmark decision in *Marathon*, as well as with the statutory scheme mandated by *Marathon*. That the bankruptcy court, in overseeing the administration of the bankruptcy estate, should exercise its "core" jurisdiction over an adversary proceeding involving a post-petition contract, comports with this Court's concerns, as expressed in *Marathon*, as well as with the purposes of Congress in enacting BAFJA in response to such concerns.

B. *Marathon*

The distinction between core and noncore proceedings contained in 28 U.S.C. § 157 – which underlies the first of the two issues involved in this appeal – is a direct result of this Court's decision in *Marathon*. The issue in *Marathon* was the constitutionality of former § 1471 of the Bankruptcy Act of 1978, specifically, whether Congress' jurisdictional grant to bankruptcy courts contained in that section violated Article III of the Constitution.

The underlying dispute in *Marathon* involved a suit brought by the debtor subsequent to the filing of its petition for reorganization to recover damages for, *inter alia*, alleged

breaches of contract and of warranty. Importantly, the breaches alleged to have been committed had occurred *prior* to the filing of the bankruptcy petition. 458 U.S. at 84.

Appellants argued that Congress' grant of jurisidiction in § 1471 violated Article III because it impermissibly vested in non-Article III bankruptcy judges the "judicial power" reserved to judges with the protections contained in Article III, that is, life tenure and irreducible compensation. The Court, in a plurality opinion, agreed that the bankruptcy court, as then constituted, could not hear and determine the state law claims involved in *Marathon*.

The plurality concluded that § 1471 had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court and ha[d] vested those attributes in a non-Art. III adjunct." 458 U.S. at 86-87. As such, the jurisdictional grant could not be sustained.

The actual holding of *Marathon*, however, is limited by the fact that only four justices joined in the lead opinion. Then Associate Justice Rehnquist concurred in the opinion in a limited manner, thus constituting the decision of the Court. As summarized by former Chief Justice Burger's dissent:

> the Court's holding is limited to the proposition stated by Justice REHNQUIST in his concurrence in the judgment – that a *"traditional"* state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Art. III court" if it is to be heard by any court or agency of the United States.

Id., 458 U.S. at 92 (Burger, C.J., dissenting; emphasis added).

The limited nature of this holding has twice been reaffirmed by the Court. In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court stated:

> The Court's holding in [*Marathon*] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a *traditional* contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review.

Id., 473 U.S. at 584 (emphasis added). This view was repeated by the Court the following year in *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833, 839-840 (1986).

This limited holding, together with the resulting statutory scheme, provides the rationale for the Second Circuit's decision that the adversary proceeding herein is core.

C. *The Broad Jurisdictional Scheme of the Bankruptcy Amendments and Federal Judgeship Act*

Congress' response to the Court's mandate in *Marathon* was the enactment of a new jurisdictional statute, BAFJA. To meet the dictates of *Marathon*, Congress established the bankruptcy judges in each judicial district as a unit of the district court, known as the bankruptcy court of that district. 28 U.S.C. § 151. The bankruptcy judge was denominated "a judicial officer of the district court" and was given "the authority conferred under this chapter with respect to any action, suit or proceeding. . . ." *Id.*

The procedures for determining what matters would be referred to the bankruptcy courts were contained in 28 U.S.C. § 157. The district court was empowered to refer to bankruptcy judges "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . ." 28 U.S.C. § 157(a). In accordance with § 157(b), "Bankruptcy judges may *hear and determine* all cases under title 11 and *all core proceedings arising under title 11*, or *arising in a case under title 11* . . . . and may enter appropriate orders

and judgments subject to review under section 158." 28 U.S.C. § 157(b)(1) (emphasis added).

The following subsection includes a non-exclusive list of fifteen types of "core proceedings", of which the first – "matters concerning the administration of the estate" – is relevant to this appeal.[6] *See* 28 U.S.C. § 157(b)(2)(A). With respect to proceedings that were not core proceedings but were "otherwise related to a case under title 11", the bankruptcy judge was empowered to submit proposed findings of fact and conclusions of law to the district court, subject to the district court's *de novo* review. 28 U.S.C. § 157(c)(1).

Thus did Congress preserve the constitutional distinction contained in *Marathon*. Bankruptcy judges were specifically authorized to hear *and* determine the vast majority of proceedings. *See Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 168 (1st Cir. 1987) ("Congress intended that 'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95% of the proceedings brought before bankruptcy judges would be core proceedings," *citing*, Statement of Rep. Kastenmeier, 130 Cong. Rec. E1108-E1110 (daily ed. March 20, 1984); Statement of Rep. Kindness, *Id.*, at H1848, H1850.).

Recognizing the state law nature of many bankruptcy questions, Congress specifically provided that, "(a) determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." 28 U.S.C. § 157 (b)(3).[7]

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[6] Initially, before the Bankruptcy Court, Ben Cooper argued that the adversary proceeding could be deemed "core" under four subsections of § 157(b)(2). The Bankruptcy Court ruled that the proceeding was core under 157(b)(2)(A) (administration) and 157(b)(2)(L) (confirmation of plans). The Second Circuit relied only on subsection (A).

[7] Petitioners apparently ignore this part of the statute. Clearly, noncore cases are not synonymous with state law claims.

To satisfy the constitutional mandate of *Marathon*, a core proceeding need not involve a "public" right.[8] Rather, it need only involve a claim which is not a *traditional* state common-law claim, *i.e.*, a claim which is either made subject to a federal rule of decision, or is more than peripherally related to a bankruptcy proceeding.

The broad nature of "core" jurisdiction is fully supported by the legislative history of BAFJA. As summarized by the First Circuit in *In re Arnold Print Works, Inc.*, *supra*, 815 F.2d at 168:

> [The Sponsors] used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as "Marathon-type" cases, *see, e.g., id.* at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of "a very limited kind," *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness). Representative Kastenmeier said that "jurisdiction in core bankruptcy proceedings is broader than the summary jurisdiction under pre-1978 law," 130 Cong.Rec. E1108 (daily ed. March 20, 1984), and summary jurisdiction covered post-petition claims.

See also In re Axona International Credit & Commerce Ltd., 115 Bankr. 442, 446 (S.D.N.Y. 1990) ("Bankruptcy judges should be granted as broad authority as constitutionally permissible

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[8] This conclusion follows from *Granfinanciera*, which teaches that a disputed core matter (*e.g.*, a fraudulent conveyance) was not properly adjudicated in a non-Article III bankruptcy court even though it was not deemed to involve a "public right." 109 S.Ct. 2782.

in order to allow them to serve as effective custodians of our Bankruptcy Code."); *Pollner v. Connecticut Bank and Trust Co., N.A. (In re Harbor Park Associates Limited Partnership)*, 112 Bankr. 555, 558 (S.D.N.Y. 1990); *Meininger v. Swasey (In re Sarasota Casual, Inc.)*, 90 Bankr. 496, 497 (Bankr. M.D. Fla. 1988).

In light of the broad and flexible configuration of core jurisdiction contained in BAFJA – which was Congress' response to the constitutional infirmities invalidated in *Marathon* – the soundness of the Second Circuit's holding below becomes clear.

D. *The Second Circuit's Line of Cleavage*

The Second Circuit, like the First Circuit in *Arnold Print Works*, recognized that a debtor operating under the bankruptcy law is an entity entirely distinct from its pre-petition embodiment. By commencing the bankruptcy case, the entity becomes a debtor, seeking and being given the protection of the bankruptcy court. *See* 11 U.S.C. § 301. Upon such filing, the bankruptcy estate is created. 11 U.S.C. § 541(a). This "line of cleavage", *see Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118, 125-126 (1949), according to the Second Circuit, is what sets this case apart from *Marathon*, as well as other cases raising pre-petition claims.[9]

The "line of cleavage" having been drawn when Ben Cooper filed its Chapter 11 petition, the Second Circuit went on to

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[9] Contrary to petitioners' argument, this distinction *is* of importance and has been relied upon by numerous cases in distinguishing the pre-petition claim in *Marathon* from post-petition claims. *See, e.g., Edgcomb Metals Co. v. Eastmet Corp.*, 89 Bankr. 546, 553 (D.Md. 1988); *In re Sarasota Casual, Inc.*, 90 Bankr. 496, 498 (Bankr. M.D. Fla. 1988); *Rafoth v. National Union Fire Ins. Co. (In re Baker & Getty Financial Services, Inc.)*, 88 Bankr. 137, 139-40 (Bankr. N.D. Ohio 1988); *Burns v. Massachusetts Property Insurance Underwriting Assoc. (In re Mike Burns Inn, Inc.)*, 70 Bankr. 863, 867 (Bankr. D. Mass. 1987).

determine whether Ben Cooper's adversary proceeding, based on a post-petition insurance contract, fit within one of the enumerated core proceedings contained in § 157(b)(2). It found its provision in subsection (A) – "matters concerning administration of the estate."[10]

The Second Circuit reviewed the facts which set this case apart from *Marathon*. In holding that the adversary proceeding was core, the Second Circuit stated:

> the Georgia facility was an asset of the estate; Cooper's reorganization plan promised adequate insurance for the estate assets; the bankruptcy court's confirmation of the plan was premised on adequate insurance; and appellees were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. It is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration.

896 F.2d at 1399-1400 (citations omitted).[11] *See also In re Mike Burns Inn, Inc.*, 70 Bankr. 863 (Bankr. D. Mass. 1987) (adversary

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[10] Petitioners argue that since the list of core proceedings does not include insurance disputes, this fact alone leads to the conclusion that the dispute is not core. At best, this is a strained reading of the non-exhaustive list of core proceedings. Presumably, petitioners would have preferred that Congress had listed every conceivable type of core proceeding. This, Congress chose not to do. *See, e.g., In re Mankin*, 823 F.2d 1296, 1300-1301 (9th Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("Section 157(b)(2) does not set categorical limits on the jurisdiction of bankruptcy courts over core proceedings, but rather merely enumerates examples of proceedings falling within a bankruptcy court's core proceeding jurisdiction.").

[11] The Second Circuit distinguished two cases relied on by petitioners below and reiterated in their brief here. The Court distinguished *Piambo Corp. v. Castlerock Properties, Inc. (In re Castlerock Properties)*, 781 F.2d 159 (9th

(Footnote continued)

proceeding to recover on post-petition insurance contract was core under 157(b)(2)(A)); *Heaven Sent, Ltd. v. Centennial Insurance Co. (In re Heaven Sent, Ltd.)*, 50 Bankr. 636, 638 (Bankr. E.D. Pa. 1985) ("We hold that the question of preservation of insurance in a chapter 11 proceeding is directly related to the administration of the estate").

The post-petition distinction – together with all of its implications – is well-founded in the case law subsequent to *Marathon* and BAFJA. In *Arnold Print Works*, the First Circuit came to the conclusion later adopted by the Second Circuit. The underlying dispute in *Arnold* evolved from the sale of printing rollers, part of the liquidation of the debtor's assets.[12] The First Circuit found that the debtor's action to collect a post-petition contractual debt fell within the literal wording of § 157(b)(2)(A), "because it involves a claim that arose out of the administrative activities of a debtor-in-possession." *Id.*, 815 F.2d at 168.[13] *See also In re Baker & Getty Financial Services, Inc.*, 88 Bankr. 137, 140 (Bankr. N.D. Ohio 1988) ("We believe that the post-Petition insurance contract at issue here is analagous to the post-Petition contract considered in *Arnold*. As a result, we fully subscribe to the reasoning expressed by the *Arnold* court on this issue"); *In re Sarasota Casual, Inc.*, 90 Bankr. 496, 497-498 (Bankr. M.D. Fla. 1988) ("The vast majority of courts

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Cir. 1986), as apparently involving a pre-petition contract, and as reading the statutory scheme in a way that "would render the general provisions [of § 157(b)(2)] null." 896 F.2d at 1400. The Second Circuit also rejected the formulation of the Court in *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), that a core proceeding must be one that, by its nature, could only exist in a bankruptcy case. Instead, the Second Circuit found that "the timing of a dispute may render it uniquely a bankruptcy case." 896 F.2d at 1400.

[12] In this regard, Ben Cooper's case is even stronger than that of the debtor in *Arnold*. The procurement of insurance was *required* of Ben Cooper. Thus, the contract at issue was integrally related to the debtor's reorganization efforts and the administration activities of the estate.

[13] Petitioners clearly misapply the literal wording of the statute. Disputes such as the one herein and in *Arnold* clearly arise *in* a case under title 11.

that have considered the status of similar post-petition claims have held that they were core proceedings . . . . A post petition contract made by a debtor-in-possession cannot be called a "Marathon" state contract action"); *In re Mike Burns Inn, Inc.*, 70 Bankr. 863, 867 (Bankr. D. Mass. 1987) ("the instant case is distinguishable from *Marathon* because the Debtors are suing . . . for *post-petition* breach of contract and deceit, matters clearly affecting this Court's administration of the Debtor's estates" [emphasis in original]); *L.A. Clarke and Son, Inc. v. Bullock Construction, Inc. (In re L.A. Clarke and Son, Inc.)*, 51 Bankr. 31, 33 (Bankr. D.C. 1985) ("All the operative events . . . occurred during the period after the Debtor's Chapter 11 petition was filed, while the Debtor was a Debtor-in-possession, and they all involved the activities of the Debtor as Debtor-in-possession, operating under the aegis of this Court's protection and authority.").

In distinguishing the case before it from *Marathon* and its Article III considerations, the First Circuit, in *Arnold Print Works*, determined that a debtor's post-petition claims were both historically and functionally different from the claims in *Marathon*. 815 F.2d at 169. Thus, post-petition claims are not the "traditional" state law contract claims required to be determined by Article III judges. Rather, such claims historically were adjudicated by bankruptcy courts since at least 1898. *Id.*, 815 F.2d at 169.

Furthermore, the First Circuit reasoned that a debtor-in-possession is, in effect, a creature of the bankruptcy court itself. Thus, one who contracts with a debtor-in-possession is, in effect, contracting with the bankruptcy court and subjecting itself to the bankruptcy court's jurisdiction. *Id.*, 815 F.2d at 170. *Accord, Woodard v. Sanders (In re SPI Communications & Marketing, Inc.)*, 112 Bankr. 507, 510 (Bankr. N.D.N.Y. 1990) ("the debtor-in-possession is, to an extent, viewed as an officer of the bankruptcy court [and] the contract is treated as a contract with the Court itself. The party entering into the contract thereby subjects himself to the bankruptcy court's jurisdiction"); *Edgcomb Metals Co. v. Eastmet Corp.*, 89 Bankr. 546, 550

(D.Md. 1988) ("This case asks whether an entity that chooses to contract with a debtor in its capacity as debtor-in-possession, knowing that the debtor is subject to the bankruptcy court's control, has consented to the bankruptcy court's [core] jurisdiction. The Court thinks it has.").[14]

One of the leading commentators on bankruptcy agrees that the "better result" is that proceedings involving post-petition claims are core proceedings since the cause of action "arises in" a title 11 case, and was not owned by the debtor at the time the case was commenced. L. King, *Collier on Bankruptcy*, 15th ed. ¶ 3.01 [iv] at 3-50 (1990). *See also Eastern Electric Sales Co., Inc. v. General Electric Co.*, 94 Bankr. 348, 349 (E.D. Pa. 1989) ("an action to recover on a debt which accrued after the bankruptcy petition was filed is core because it 'aris[es] in a case under title 11,' 28 U.S.C. § 157(b)(1); it was not already 'owned by the debtor' at the time the bankruptcy petition was filed").

* * *

When the Supreme Court in *Marathon* invalidated the jurisdiction of the bankruptcy courts, it held that it was constitutionally impermissible for Article I courts to finally resolve traditional state law claims. Congress responded with BAFJA, in which it satisfied the Court's concerns by permitting the Article I bankruptcy judges to hear and determine those "core" proceedings (including certain state law claims) which are inextricably related to the bankruptcy estate, while limiting their ability to finally determine traditional state law (i.e., related) proceedings.[15]

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[14] Petitioners' claim that it has been unwillingly swept into the "maze" of bankruptcy jurisdiction is disingenuous as petitioners willingly and knowingly entered into a contract with a debtor-in-possession.

[15] Respondent acknowledges this Court's concern expressed in *Marathon* that the final adjudication of "private rights" (as the "traditional state law" claims in *Marathon*) should be reserved for Article III courts while the final adjudication of "public rights" may be delegated to Article I courts. *Marathon*, 458

(Footnote continued)

The Second Circuit's determination that the adversary proceeding is core is fully consistent with these distinctions. Congress recognized that matters involving estate administration were "core" to the functions of the bankruptcy courts. Here, where the debtor, as part of its reorganization activities, was required to obtain insurance, and entered into an insurance contract with an entity which knew it was dealing with a debtor-in-possession, it is clear that such matters, as the Second Circuit stated, "are intrinsic to estate administration." Thus, this adversary proceeding is core under § 157(b)(2)(A) and the holding of the Second Circuit should be affirmed.

II

THE CONDUCT OF JURY TRIALS IN BANKRUPTCY COURT IS CONSISTENT WITH STATUTORY AND CONSTITUTIONAL AUTHORITY AND IS SUPPORTED BY POLICY CONSIDERATIONS

A. *Introduction*

In its most recent pronouncement on the issue of jury trials in bankruptcy proceedings — *Granfinanciera* — this Court expressly left open the second question which is raised in this appeal, namely, whether bankruptcy courts have the statutory and constitutional authority to conduct jury trials.[16] For sound

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U.S. at 71. Although the concept of "public rights" has been expanded (*see, Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. at 593-594), respondent acknowledges that the Court has not equated "public rights" with all "core" proceedings. *See Granfinanciera*, 109 S.Ct. at 2805 (White, J., dissenting). However, respondent agrees with the Second Circuit that such a leap is not necessary in reaching a determination that a contract knowingly entered into with a debtor-in-possession (and which is mandated by its plan of reorganization) is not the type of traditional state law "private" claim which requires adjudication by an Article III court.

[16] Petitioners obviously read *Granfinanciera* selectively. The Court's language in *Granfinanciera* can hardly be "dispositive" of this appeal since the Court expressly left open the jury trial issue. 109 S.Ct. at 2801.

reasons, both of a legal and policy nature, this Court should find that bankruptcy courts have such authority.

In *Granfinanciera*, the Court ruled that a party who has not filed a claim in a pending bankruptcy proceeding is entitled to a jury trial in an action seeking to set aside a fraudulent conveyance – notwithstanding Congress' inclusion of actions to set aside fraudulent conveyances in its non-exclusive list of core proceedings, 28 U.S.C. § 157(b)(2) (H). *Id.*, 109 S.Ct. at 2800. The gravaman of the Court's holding is that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or specialized court of equity." *Id.*, 109 S.Ct. at 2800.

That having been said, the Court deferred ruling on whether the bankruptcy court could conduct the jury trial:

> We do not decide today whether the current jury trial provision - 28 U.S.C. § 1411 (1982 ed., Supp. IV) - permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments.

Id., 109 S.Ct. at 2802.

Nevertheless, the Court expressly left the door ajar, if not open:

> (O)ne cannot easily say that "the jury would be incompatible" with bankruptcy proceedings, in view of Congress' express provision for jury trials in certain actions arising out of bankruptcy litigation. *See* 28 U.S.C. § 1411 (1982 ed., Supp. IV). And Justice WHITE's claim that juries may serve usefully as checks only on the decisions of judges who enjoy life

> tenure, see *post*, at 2812, overlooks the extent to which judges who are appointed for fixed terms may be beholden to Congress or executive officials, and thus ignores the potential for juries to exercise beneficial restraint on their decisions.

Id., 109 S.Ct. at 2801 (citations omitted).[17]

In deciding this issue, the Court must choose between the conflicting views of the Second Circuit in the case appealed from – which held that bankruptcy courts have both the statutory and constitutional authority to conduct jury trials – and of the Eighth and Tenth Circuits[18], which ruled that bankruptcy courts lacked the statutory authority to conduct jury trials.[19]

Ben Cooper submits that the position of the Second Circuit should be affirmed by this Court, not only for the sound reasons advanced by the Second Circuit, but because the conduct of jury trials in the bankruptcy courts is most consistent with the long-standing, well-settled and laudable purposes of Chapter 11 bankruptcy proceedings – to expeditiously and efficiently restore a debtor's financial health and reinstate the debtor as a productive member of society.[20]

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[17] Petitioners, in their "neutrality" argument, omit reference to the potential for juries to serve as checks on judges who do not enjoy life tenure, as explicitly recognized in *Granfinanciera*.

[18] *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990); *In re Kaiser Steel Corporation*, 911 F.2d 380 (10th Cir. 1990).

[19] Neither the *Missouri Bank* nor *Kaiser* decisions addressed the constitutionality of jury trials in bankruptcy courts, relying solely on their belief that bankruptcy courts lacked the statutory authority to conduct jury trials.

[20] As the Second Circuit noted, the majority of cases which have addressed the issue have found that jury trials may be conducted in core proceedings. *See*, Gibson, "Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment," 72 Minn. Law Rev. 967, 1027-1034 (1988) (hereinafter "*Gibson*"). *See also*, *In re Windmill Farms Management Co.*, 116

(Footnote continued)

B. *Statutory Authority to Conduct Jury Trials*

In analyzing the statutory basis for the conduct of jury trials in bankruptcy courts, the Second Circuit (despite the fact that this Court referred to it in *Granfinanciera*) found insufficient guidance in 28 U.S.C. § 1411 – the only statute presently in effect which explicitly addresses this issue. Instead, the Second Circuit looked to the jurisdictional grants contained in BAFJA, analyzing these sections in light of *Granfinanciera*.

Section 151 of Title 28, the general grant of jurisdiction, gives to bankruptcy judges "the authority conferred under this chapter with respect to any action, suit, or proceeding." 28 U.S.C. § 151. Section 157(b) grants bankruptcy judges the authority to "hear *and* determine all cases under title 11 and *all core proceedings* arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and *judgments*, subject to review under section 158 of this title." 28 U.S.C. § 157(b) (emphasis added).

In light of *Granfinanciera's* holding that the Seventh Amendment right to a jury trial may attach in certain core proceedings, the Second Circuit reasoned that the only way to reconcile the statutory scheme with *Granfinanciera* was to permit bankruptcy courts to hold jury trials. Any other interpretation would render the statutory scheme meaningless. As the Eighth Circuit recognized in *United Missouri Bank*, even though the authority to conduct jury trials may not be expressly provided, "that authority may still be implied if it is incidental and necessary to make the legislation effective." 901 F.2d at 1455, *citing*, 2A Sutherland Stat. Const. § 55.04 (1984); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941).

Bankr. 755, n. at 765 (Bankr. S.D. Cal. 1990) ("The controlling precedent in this district is that [bankruptcy courts] do have jury trial powers in core proceedings."); *Citibank, N.A. v. Park-Kenilworth Industries, Inc.*, 109 Bankr. 321, 328 (N.D. Ill. 1989) ("a clear majority of these courts have found that bankruptcy courts have the power to conduct jury trials in core proceedings" [citing cases therein]); *Walsh v. Long Beach Honda (In re Gaildeen Industries, Inc.)*, 59 Bankr. 402, 406 (N.D. Cal. 1986) ("the overwhelming majority of published decisions addressing the issue have concluded that bankruptcy courts do have the power to conduct jury trials." [citing cases therein]).

The Second Circuit's analysis, as well as the analysis undertaken by other courts and commentators, leads ineluctably to the conclusion that bankruptcy courts have the statutory authority to conduct jury trials.

1. *28 U.S.C. § 1411*

The only current section which explicitly addresses the question of jury trials in bankruptcy proceedings is 28 U.S.C. § 1411, one of the sections added by BAFJA. That section reads, in its entirety, as follows:

> § 1411. Jury Trials.
>
> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.
>
> (added Publ.L. 98-353, Title I, § 102(a), July 10, 1984, 98 Stat. 335.)

Section 1411 replaced a section of the former Bankruptcy Reform Act which was invalidated by *Marathon*. The predecessor to § 1411 was § 1480, which provided, in part, that "this chapter and title 11 do not affect any right to trial by jury, in a case under title 11 or in a proceeding arising under title 11 or arising in or related to a case under title 11 . . . ." Section 1480 was generally interpreted as expressing Congress' intent to allow bankruptcy judges to hold jury trials. *See, e.g., In re Gaildeen Industries, Inc.*, 59 Bankr. 402, 404 (N.D. Cal. 1986) (and authorities cited therein).

The enactment of § 1411, as part of BAFJA, has thus caused a great deal of uncertainty:

> Although there is some confusion over the effect § 1411 has on the right to a jury trial in bankruptcy court, as well as the fate of the broader provision contained in § 1480, courts have generally concluded that § 1411 was not intended to limit the power of bankruptcy judges to conduct jury trials in actions other than those for personal injury or wrongful death.

In re Gaildeen Industries, Inc., *supra*, 59 Bankr. at 405. *See also Morse Electric Company, Inc. v. Logicon, Inc. (In re Morse Electric Company, Inc.)*, 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985); *Lerblance v. Rodgers (In re Rodgers & Sons, Inc.)*, 48 Bankr. 683, 687 (Bankr. E.D. Okla. 1985).

To further confuse matters, "there is very little legislative history to tell us what Section 1411(a) was and was not intended to do." L. King, *Collier on Bankruptcy*, 15th ed., ¶ 3.01 [7][b][i] at 3-103 (1990). Indeed, virtually the only legislative statement on Congress' intent in enacting § 1411 is contained in the comments by Senator Dennis DeConcini, a member of the Senate-House Committee Conference, published subsequently in ABI Newsletter No. 3, at p. 3 (Winter 1984/1985):

> I believe there was no intent on the part of Congress to alter or modify the rights to jury trial that might have existed under the Reform Act . . . There was no desire on the part of the conferees to limit the right to jury trial in other areas.

See McCormick v. American Investors Management, Inc. (In re McCormick), 67 Bankr. 838, n. at 842 (D. Nev. 1986).[21]

At the very least, § 1411 establishes Congress' belief (as stated by the Court in *Granfinanciera*) that jury trials are not incompatible with bankruptcy proceedings.

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[21] Although the remarks of one Senator are generally insufficient to establish legislative intent, *see Weinberger v. Rossi*, 456 U.S. 25, 35 (1982), in the absence of any contrary statements in the legislative history, such comments are entitled to some weight. *See In re McCormick*, *supra*, 67 Bankr. at 842.

2. *The Jurisdictional Statutes*

The uncertainty engendered by § 1411 requires analysis of 28 U.S.C. § 157 – the primary statute revamping the jurisdiction of the bankruptcy courts following *Marathon*.

As stated previously, the Second Circuit placed primary reliance on § 157(b), which permits bankruptcy judges to hear *and* determine core proceedings, in finding statutory authority for jury trials in bankruptcy courts. Other courts have similarly relied on § 157. *See, e.g., Citibank, N.A. v. Park-Kenilworth Industries, Inc.*, 109 Bankr. 321, 328 (N.D. Ill. 1989) (§ 157(b)); *Daily v. First Peoples Bank of New Jersey*, 76 Bankr. 963, 967-68 (D. N.J. 1987) (§ 157(b)); *Data Compass Corp. v. Datafast, Inc. (In re Data Compass Corp.)*, 92 Bankr. 575, 582 (Bankr. E.D.N.Y. 1988) (§ 157(b)); *Macon Prestressed Concrete Co. v. Duke*, 46 Bankr. 727, 730 (M.D. Ga. 1985) (§ 157(a)). Indeed, as the Second Circuit acknowledged, the only way to reconcile the express statutory language with this Court's holding in *Granfinanciera* is to find that a bankruptcy court's authority to hear and determine core proceedings and to issue judgments therein must necessarily include the right to conduct a jury trial.[22] "The power to be implied . . . must be practically indispensible and essential in order to execute the power actually conferred." 2A Sutherland Stat. Const. § 55.03. Here, the power to conduct a jury trial *is* indispensible and essential in order for bankruptcy courts to "hear and determine" core proceedings.

As one of the leading bankruptcy commentators has stated:

> It is not an overly generous construction of section 157(a), however, to conclude that the authority given the district court to refer cases and proceedings "vests

[22] Admittedly, under the present statutory scheme, it would appear unlikely that a bankruptcy court could conduct a jury trial in a noncore or related proceeding, both because of the *de novo* review of bankruptcy court determinations in noncore matters, 28 U.S.C. § 157(c)(1), and because such review would violate the Seventh Amendment's re-examination clause. Petitioners' devotion of a substantial portion of their brief to this issue is inapposite.

> the bankruptcy court with the same authority to conduct a jury trial" as exists in the district court.

L. King, *Collier on Bankruptcy*, 15th ed., ¶ 3.01 [7][b][i] at 3-106 (1990), *quoting*, *Macon Prestressed Concrete Co. v. Duke*, *supra*, 47 Bankr. 727.

Indeed, as acknowledged by the Eighth Circuit in *United Missouri Bank*, implied authority for bankruptcy courts to conduct jury trials may be found in the limitations placed on the District Court's authority to conduct jury trials under § 157(b)(5) (requiring that jury trials on personal injury tort and wrongful death actions be conducted by the district court). This limitation has been relied upon by some courts in finding that jury trials of other matters *may* be held in bankruptcy courts. *See Perino v. Cohen (In re Cohen)*, 107 Bankr. 453, 455 (S.D.N.Y. 1989); *Wolfe v. First Federal Savings & Loan Association of Paragould (In re Wolfe)*, 68 Bankr. 80, 87-88 (Bankr. N.D. Tex. 1986).

The authorities – including the Eighth and Tenth Circuits – which rely on the lack of express statutory authority to conduct a jury trial in bankruptcy base such conclusions on a faulty assumption – that only an express statutory grant would permit the bankruptcy courts to conduct jury trials. The district courts themselves do not have express statutory authority to conduct jury trials. *See Gibson*, n. at 1027-1028; 28 U.S.C. § 1861, *et seq.*; 28 U.S.C. § 81, *et seq.* Rather, this authority is presumed by the grant of jurisdiction over matters at law. To require express and unequivocal statutory authority to conduct a jury trial in bankruptcy court and not require the same for district courts is, at best, inconsistent.[23]

Therefore, the Second Circuit's reliance on § 157 is well-founded.

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[23] Indeed, the *lack* of an express prohibition of jury trials in bankruptcy has led some courts to find the authority implicit to do so. *See, e.g., In re McCormick*, *supra*, 67 Bankr. at 841 ("It is clear that there is no express statutory provision prohibiting bankruptcy courts from conducting jury trials.").

3. *Congressional Intent*

Although express statutory authority may be lacking, it is appropriate to look to legislative history from which congressional intent on this issue may be gleaned. *See, Blum v. Stenson*, 465 U.S. 886, 896 (1984).

When *Marathon* invalidated the key provisions of the 1978 Act, the Judicial Conference promulgated emergency rules to be applied until the statutory scheme could be reworked. Among the emergency rules was a rule expressly prohibiting jury trials.[24] When Congress subsequently enacted BAFJA, it adopted the vast majority of the provisions contained in the emergency rules. However, Congress did not adopt the rule prohibiting jury trials in bankruptcy courts. Courts and commentators have taken this to be a clear indication that Congress intended that jury trials be a part of the new bankruptcy scheme. *See, e.g., Taxel v. Electronics Sports Research (In re Cinematronics, Inc.)*, 111 Bankr. 902, 905 (S.D. Cal. 1990); *Citibank, N.A. v. Park-Kenilworth Industries, Inc.*, 109 Bankr. 321, 328 (N.D. Ill. 1989); *In re McCormick, supra*, 67 Bankr. at 842; *Daily v. First Peoples Bank of New Jersey*, 76 Bankr. 963, 967 (D.N.J. 1987); *In re Gaildeen Industries, supra*, 59 Bankr. at 406; *Gibson*, n. at 1031-1032.[25]

Further legislative intent can be found in Congress' enactment of § 157(b) itself. As the Second Circuit found, the ability granted to bankruptcy judges to "hear *and* determine" core proceedings evinces congressional intent that bankruptcy judges may conduct jury trials. *See also In re Gaildeen Industries, Inc., supra*, 59 Bankr. at 406.

This much is clear: when Congress enacted BAFJA, it intended to build upon the expanded scope of bankruptcy jurisdiction envisioned by the 1978 Act subject, of course, to *Marathon's*

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[24] Subsection (d)(1) of the emergency rules provided that "the bankruptcy judges may not conduct . . . jury trials." *See Gibson*, n. at 988.

[25] Petitioners cannot have it both ways. They cannot rely on the emergency rules' prohibition of jury trials, yet ignore that Congress chose not to enact that portion of the rules.

limitations.[26] *See, e.g., Huffman v. Perkinson (In re Harbour)*, 840 F.2d 1165, 1178 (4th Cir. 1988) ("as we have previously noted, Congress took an expansive approach to jury trials in the 1978 Act."). As noted previously, Congress intended that a bankruptcy court's core jurisdiction be close to or congruent with permissible constitutional limits. *See In re Arnold Print Works, supra*, 815 F.2d. at 168. It would be wholly inconsistent with this congressional intent if a significant percentage of core cases were removed from bankruptcy court jurisdiction because of a party's entitlement to a jury trial.

C. *Constitutional Authority to Conduct Jury Trials*

After determining that there existed a sufficient statutory basis for a bankruptcy court to conduct a jury trial, the Second Circuit turned to an analysis of the Constitution. The Second Circuit found no impediment in the Seventh Amendment, at least as to core proceedings, since the statutes did not require *de novo* review of determination in core proceedings. 896 F.2d at 1403. As for Article III, the Second Circuit reasoned that since bankruptcy courts have the constitutional power to enter final judgments without violating Article III, it must necessarily follow that jury trials do not conflict with the requirements of Article III. 896 F.2d at 1403-1404.

The Second Circuit's constitutional analysis is sound and should be adopted in affirming its decision below.[27]

1. *The Seventh Amendment*

There appears little doubt that, after *Granfinanciera*, Congress cannot abridge a litigant's Seventh Amendment rights by

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[26] "A major impetus underlying [the 1978 Act] has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction . . . ." S.Rep. No. 95-989, 95th Cong., 2nd Sess., 17 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5587, 5803, as quoted in *In re Data Compass Corp., supra*, 92 Bankr., n. at 579.

[27] Since neither the Eighth Circuit in *In re Missouri Bank, N.A.* nor the Tenth Circuit in *In re Kaiser Steel Corp.* reached the constitutional issues, there is no other Circuit level authority taking issue with the Second Circuit's approach.

relabeling as a "core" matter one in which a litigant would otherwise be entitled to a jury trial. 109 S.Ct. at 2800. However, this does not make a jury trial in bankruptcy court inconsistent with the Seventh Amendment, at least with respect to a core proceeding.

A jury trial in bankruptcy court is clearly consistent with the essential attributes of a Seventh Amendment jury trial. This Court has expressly sanctioned Seventh Amendment jury trials in non-Article III courts – specifically the District of Columbia Courts. *See Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974). *See also Gibson*, at 1036-1037 ("The District of Columbia courts illustrate most persuasively that the seventh amendment does not require that only article III judges preside over jury trials."). There is no question that bankruptcy judges have the competence to perform the functions required of judges under the Seventh Amendment. *See In re McCormick*, *supra*, 67 Bankr. at 842 ("This is especially true because a judge's duty in a jury trial is not significantly different from the traditional functions of a bankruptcy judge."). *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899), does not mandate a different conclusion, as it teaches merely that a jury must be ". . . under the superintendence of a judge empowered to instruct them on the law and on the facts . . . ." 174 U.S. at 13-14.

In addition, jury trials in core bankruptcy proceedings do not violate the re-examination clause of the Seventh Amendment.[28] Since a bankruptcy court's findings in a core proceeding are subject only to ordinary appellate review (28 U.S.C. § 158), there is no such impediment here. *See, e.g., Luper v. Langley (In re Lee Way Holding Co.)*, 115 Bankr. 586, 591 (S.D. Ohio 1990) ("Hence, the Court of Appeals [in *Ben Cooper*] determined that the review of the jury verdict under traditional standards of appellate review does not violate the Seventh Amendment . . . . This Court embraces the rationale articulated by the Second Circuit").

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[28] As conceded earlier, and as stated by the Second Circuit below, jury trials in noncore or related proceedings would pose Seventh Amendment problems.

The Second Circuit is correct: there is no impediment to a bankruptcy court's conduct of a jury trial in the Seventh Amendment.

2. *Article III*

As the Second Circuit noted, there is one additional constitutional hurdle to the conduct of a jury trial in bankruptcy courts — the reservation of the "judicial power" to Article III courts.

One of the acknowledged purposes of Article III — to preserve the independence of the federal judiciary — is not compromised by a jury trial in bankruptcy court. In fact, a jury may "exercise beneficial restraint" on the decisions of a non-Article III judge. *See Granfinanciera*, 109 S.Ct. at 2801; *In re Lee Way Holding Co.*, *supra*, 115 Bankr. at 591 ("This Court is in full agreement [with the Second Circuit in *Ben Cooper*] that jurors are even less likely to feel pressure from the legislative or executive branches of government than judges, particularly bankruptcy judges who do not enjoy lifetime tenure."). *See also Gibson*, at 1042-1043 ("The potential for domination of the federal judiciary [by the other branches], however, is greater in the case of a bench trial, when the judge is the fact finder, than in the case of a jury trial.").

The restriction of jury trials to Article III courts is not mandated by *Marathon*. While the Court in *Marathon* referred to the power to conduct a jury trial as an example of one of the impermissible delegations to Article I courts, it held solely that it was the aggregate of these delegated powers which constituted this impermissible delegation. *Marathon* did *not* hold that bankruptcy courts cannot constitutionally conduct a jury trial.[29] *See, e.g., Daily v. First Peoples Bank of New Jersey*, *supra*, 76 Bankr. at 967 ("*Marathon* found unconstitutional the grant to bankruptcy courts of 'most, if not all, of the essential attributes of the judicial power,' but did not specifically void the power to hear cases tried by jury"); *M&E Contractors, Inc. v. Kugler-Morris General Contractors, Inc.*, 67 Bankr. 260, 266 (N.D.

[29] Indeed, petitioners concede that *Marathon* did not go so far. *Granfinanciera* has expressly left open this question.

Tex. 1986) ("[Justice Brennan] did not state, explicitly or implicitly, that only Article III courts may preside over jury trials"); *In re Gaildeen Industries, Inc., supra*, 59 Bankr. at 407 ("The Court did not hold that allowing bankruptcy courts to conduct jury trials would, in and of itself, constitute an unwarranted encroachment upon the judicial power of the United States.").

Further support for *Marathon's* limited holding can be found in the Court's adoption of since-repealed Bankruptcy Rule 9015:

> One year after its decision in *Northern Pipeline*, the Supreme Court adopted the since repealed Bankruptcy Rule 9015, which allowed jury trials in bankruptcy court. *Walsh v. Long Beach Honda (In re Gaildeen Industries)*, 59 B.R. 402, 407 (N.D. Cal. 1986). "Surely had the Court meant to preclude bankruptcy judges from conducting jury trials, it would not have adopted the Rule." *Id.* True, Rule 9015 has been repealed, but the advisory note commenting on its repeal left open the question of whether or not bankruptcy courts may conduct jury trials.

In re Cinematronics, Inc., supra, 111 Bankr. at 906. *See also In re McCormick, supra* 67 Bankr., n. at 840 ("(o)ther courts have concluded that the Supreme Court did not hold that jury trials in the bankruptcy courts are unconstitutional because, after *Marathon*, the Court promulgated the new Bankruptcy Rules of Procedure."); *Hassett v. Weissman (In re O.P.M. Leasing Services, Inc.)*, 48 Bankr. 824, n. at 827 (S.D.N.Y. 1985) ("the Supreme Court provided for jury trials under Bankruptcy Rule 9015 in 1983 . . . . and this Court declines to find that the Supreme Court would promulgate meaningless rules").[30]

Indeed, as stated above, jury trials are conducted by other non-Article III judges and this authority has been upheld by this Court. *See, e.g., Pernell v. Southall Realty*, 416 U.S. 363 (1974) (District of Columbia judges).

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[30] Although Rule 9015 was subsequently repealed, the Advisory Committee note indicated that a local rule could be adopted to govern jury trials. *See, In re Heartland Chemicals, Inc.*, 103 Bankr. 1018, 1021 (Bankr. C.D. Ill. 1989).

Moreover, the U.S. Magistrates Act also permits non-article III federal magistrates to conduct jury trials, at least where both parties have consented. 28 U.S.C. § 636(c)(1). The constitutionality of such authority has been expressly upheld. *See Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984); *Puryear v. Ede's Ltd.*, 731 F.2d 1153 (5th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp.*, 739 F.2d 1313 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 1158 (1985).

This Court has never held that non-Article III courts may not conduct jury trials. The conduct of jury trials in such courts does not run counter to the purposes of Article III. The holding of the Second Circuit should be affirmed.

D. *Policy Considerations*

The conduct of jury trials within bankruptcy proceedings is appropriate for sound policy reasons and is consistent with the primary goals of the federal bankruptcy system. Removing proceedings involving jury trials from the bankruptcy courts would not only emasculate the bankruptcy courts themselves but would overwhelm an already overcrowded district court jury docket.[31]

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[31] Another argument could be advanced which is consistent with the policy goals of the bankruptcy system: that petitioners, by knowingly contracting with a debtor-in-possession, have consented to the summary jurisdiction of the bankruptcy court and, as a result, have effectively waived their right to a jury trial. *See, e.g., In re Arnold Print Works, supra*, 815 F.2d at 170 ("Parties who contract with a bankrupt company's trustee or with a debtor-in-possession know that they are dealing with an agent responsible to a bankruptcy court; that the bankruptcy court would resolve subsequent disputes should therefore come as no surprise".); *Edgcomb Metals Co. v. Eastmet Corp., supra*, 89 Bankr. 546, 550 ("This case asks whether an entity that chooses to contract with a debtor corporation in its capacity as debtor-in-possession, knowing that the debtor is subject to the bankruptcy court's control, has consented to the bankruptcy court's jurisdiction. The Court thinks it has."); *In re Vincent*, 68 Bankr. 865, 867 (Bankr. M.D. Tenn. 1987) ("Those who deal with the debtor in its capacity as the debtor-in-possession have implicitly consented to have their claims tried by the bankruptcy court, for all of the reasons that the bankruptcy system was implemented, e.g., speedy resolution of disputes

(Footnote continued)

1. *A Jury Trial is Consistent with Congress' Interest in Determining All Bankruptcy Matters In One Proceeding*

One of the primary goals of the 1978 Act and of BAFJA was the resolution of all bankruptcy matters in the context of one proceeding. *See, e.g., Gibson*, n. at 1027 ("Indeed, the consolidation of bankruptcy litigation in the bankruptcy court was one of the goals underlying Congress' enactment of the 1978 Act."); *Eastern Air Lines, Inc. v. International Association of Machines & Aerospace Workers (In re Ionesphere Clubs, Inc.)*, 108 Bankr. 951, 955 (Bankr. S.D.N.Y. 1989) ("The bankruptcy court must also look to Congressional intent to broaden the jurisdictional scope of bankruptcy proceedings in order to bring into one forum all matters related to the bankruptcy case so as to facilitate the prompt administration of the bankruptcy proceedings"). Since the enactment of BAFJA, "the manifest direction of the law has been toward the gradual expansion of the authority wielded by the bankruptcy courts." *In re Lee Way Holding Co., supra*, 115 Bankr. at 591.

Indeed, one of the cornerstones of bankruptcy jurisprudence is the bankruptcy court's ability to use its expertise in the specialized bankruptcy area to handle all aspects of a debtor's rehabilitation. This ability would be severly hampered, if not destroyed, by removing discrete parts of a bankruptcy case to the district courts because of the requirement of a jury trial.

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and administration of the estate with a view to fairness for all creditors."); *In re Alan Wood Steel Co.*, 1 Bankr. 167, 168 (Bankr. E.D. Pa. 1979) ("The courts have therefore adopted an extreme position with respect to this and have ruled that a party contracting with an officer of the court in fact contracts with the court itself, and by such act subjects himself for the purposes of the contract to the summary jurisdiction of the court . . . .").

Nor is this argument inconsistent with this Court's holding in *Granfinanciera*. A fraudulent conveyance claim may indeed have, as its historical basis, the determination of legal rights. Here, however, parties have *willingly* and *knowingly* contracted with a debtor-in-possession. It is readily apparent that the "consent" present in this situation is not present in the fraudulent conveyance context.

See, e.g., In re Data Compass Corp., supra, 92 Bankr. at 582 ("to hold that jury trials must be held in a forum other than the Bankruptcy Court is counter to the intent of Congress in establishing a centralized forum for the speedy and efficient resolution of cases essential to the administration of a case under the Bankruptcy Code."); *In re McCormick, supra*, 67 Bankr. at 843 ("Most importantly, bifurcating jury trials from other matters before the bankruptcy court would cause complex procedural questions and needless delay."); *Nashville City Bank & Trust Co. v. Armstrong (In re River Tranportation Co.)*, 35 Bankr. 556, 560 (Bankr. M.D. Tenn. 1983) ("Procedural entanglements such as these will not only obstruct and hinder the administration of the bankruptcy estate but also tempt parties to use a jury trial request as a delaying device.").

In addition, permitting a bankruptcy court to conduct a jury trial would not significantly delay the resolution of a bankruptcy case. *See Pernell v. Southhall Realty, supra*, 416 U.S. at 384. A jury trial conducted in the district court would be no more expeditious than one conducted in the bankruptcy court. The bankruptcy court, which would be more familiar with the specific issues involved in core proceedings, could conduct a more efficient jury trial. *See, e.g., In re Axona International Credit & Commerce Ltd.*, 115 Bankr. 442, 446 (S.D.N.Y. 1990) ("Because of bankruptcy judges' specialized experience and expertise, granting them such [broad constitutional] authority will best assure the economical and expeditious management of bankruptcy estates."); *In re SPI Communications & Marketing, Inc.*, 112 Bankr. 507, 512 (Bankr. N.D.N.Y. 1990) ("It defies logic that a court less acquainted with bankruptcy law will better address issues of alleged malpractice in a bankruptcy context than a bankruptcy court").

Thus, from a policy point of view, it is appropriate that *all* aspects of a bankruptcy case be heard in the bankruptcy court.

2. *Removal of Jury Trial Cases Would Add to the Backlog in the District Courts and would Delay Resolution of Bankruptcy Proceedings*

In the wake of *Granfinanciera*, it appears that a significant percentage of proceedings which come under the core jurisdiction of the bankruptcy courts may entitle litigants to trial by jury. For example, under *Granfinanciera*, core proceedings to determine, avoid or recover fraudulent conveyances could give rise to a jury trial. Under the Second Circuit's formulation, matters concerning administration of the estate, a broad category, may involve a jury trial right. Proceedings to determine, avoid or recover preferences may also require a jury trial. *See In re Gaildeen Industries, Inc., supra*, 59 Bankr. at 403; *In re O.P.M. Leasing Services, Inc., supra*, 48 Bankr. at 824. It is conceivable that other core proceedings could involve matters as to which the litigants retain their Seventh Amendment rights.

Jury trials of these proceedings in the district courts would contribute to the already backlogged district court docket. The recent Report of the Federal Courts Study Committee emphasizes the severity of the problem:

> The deterioration in the indices of federal judicial performance has been gradual, but the expanded federal effort to reduce drug trafficking has led to a recent surge in federal criminal trials that is preventing federal judges in major metropolitan areas from scheduling civil trials, especially civil jury trials, of which there is now a rapidly growing backlog. It appears that the long-expected crisis of the federal courts, caused by unabated rapid growth in case filings, is at last upon us.

Report of the Federal Courts Study Committee, April 2, 1990, p. 6 ("Report"). As stated in the Report, "(o)ne method of alleviating the problems of these [Article III] courts, therefore, is by devolution of significant areas of federal judicial business to Article I courts and to administrative agencies, with limited

review by generalist Article III courts." Report, p. 17. *See also, Gibson*, n. at 1027 ("Thus, if a bankruptcy matter is to be tried to a jury, it would appear to be preferable to allow the bankruptcy judge to conduct the trial, rather than to require this litigation to be split off from all related bankruptcy matters and added to the district court's jury trial backlog."); *M&E Contractors, Inc. v. Kugler-Morris General Contractors, Inc., supra*, 67 Bankr. at 267 ("Neither would a wholesale diversion of jury trials to district courts alleviate delays, considering the state of the typical federal district court docket.").

Removal of jury trial cases to the district courts would thus lead to inexorable delays in the final resolution of bankruptcy matters, which is anathema to the primary goals of the federal bankruptcy system, and would contribute to the "long-expected crisis of the federal courts."

CONCLUSION

The decision of the Second Circuit, while cognizant of the limitations on bankruptcy courts imposed by *Marathon* and *Granfinanciera*, nevertheless seeks to balance these limits with the overall goals of the bankruptcy system. In holding that Ben Cooper's adversary proceeding is a core proceeding, and that the bankruptcy court may conduct a jury trial, the Second Circuit achieved that balance — its decision should be upheld by this Court.

For the foregoing reasons, the judgment of the Court below should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

v.

BEN COOPER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE AND BRIEF FOR THE UNITED STATES

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE

The Solicitor General, on behalf of the United States, moves for leave to intervene as a party in this case.

1. On June 28, 1990, this Court granted the petition for a writ of certiorari. 110 S. Ct. 3269. The petition presents two questions for review: (1) "Whether the post-petition status of the contract underlying this case requires a core designation pursuant to 28 U.S.C. § 157 when the contract dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims"; and (2) "Whether a jury trial of this case in the bankruptcy court comports with article III and the seventh amendment of the Constitution when an article I judge presides over the trial subject only to appellate review in the district court."

2. Because the constitutionality of an Act of Congress affecting the public interest is drawn in question in this

case, cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the United States may intervene as of right under 28 U.S.C. 2403(a).* That Section applies "[i]n any action, suit or proceeding in a court of the United States"; 28 U.S.C. 451 defines "court of the United States" to include this Court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.16, at 341 (6th ed. 1986) (28 U.S.C. 2403 "applies to the Supreme Court as well as the lower federal courts"). Section 2403(a) by its terms accords the United States "all the rights of a party."

3. To effectuate the United States' right to intervene, 28 U.S.C. 2403(a) further provides that the Attorney General be notified of "any" case wherein "the constitutionality of any Act of Congress affecting the public interest is drawn in question." Accordingly, Federal Rule of Appellate Procedure 44 requires a party challenging the constitutionality of an Act of Congress to notify the court of appeals so that its Clerk can notify the Attorney General. Rule 29.4(b) of the Rules of this Court likewise requires that in any proceeding wherein the constitutionality of an Act of Congress is drawn in question, and the United States is not a party, "the initial pleading, motion, or paper filed in this court shall recite that

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* This Section provides:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. 2403(a).

28 U.S.C. § 2403(a) may be applicable." That Rule further provides that in proceedings from any court of the United States, "the initial pleading, motion, or paper shall also state whether or not that court, pursuant to 28 U.S.C. § 2403(a), has certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question."

Notwithstanding these rules, neither party provided the requisite notice, and no certification was provided by the clerk of the court of appeals below. The Solicitor General did not learn that the constitutionality of an Act of Congress was drawn in question in this case until the Court granted certiorari on June 28, 1990. Consequently, the United States had no opportunity to participate in this case before it reached this Court.

4. The United States has a longstanding and significant interest in the Court's resolution of the questions presented in this case. In 1978, after almost ten years of study and investigation, Congress enacted the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (repealed). The 1978 Act represented the first comprehensive revision of the bankruptcy system since 1898. Among other purposes, it was designed to reduce the serious delays in bankruptcy proceedings caused by the crowded dockets of non-bankruptcy courts.

This Court held the 1978 Act's grant of jurisdiction to bankruptcy courts unconstitutional in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In response, Congress enacted the legislation challenged in this case—the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Congress, in the 1984 Act, intended to conform the bankruptcy system to the requirements of Article III as determined by this Court. The United States has a profound interest in whether the revised bankruptcy system is found by this Court to comport with constitutional requirements.

5. On consideration of the substantial federal interest in the constitutional question in this case, and the government's statutory authority to intervene as of right with "all the rights of a party," 28 U.S.C. 2403(a), we request the Court to grant the United States leave to intervene. See *Glidden Co.* v. *Zdanok*, 368 U.S. 814, 885 (1961); *International Assoc. of Machinists* v. *Street*, 363 U.S. 825 (1960). See generally R. Stern, E. Gressman & S. Shapiro, *supra*, § 6.16, at 341; *id.* § 6.33, at 380 & n.94.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1990

QUESTIONS PRESENTED

1. Whether post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157(b)(2)(A).

2. Whether adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment.

PARTIES TO THE PROCEEDING

In addition to the captioned parties, the Light Manufacturing Co., Inc., Aimwell Products, Inc., Ben Cooper Sales Corp., Kalvin-Miller International, Inc., and Kerwick & Curran, Inc., are parties to the proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1784

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

v.

BEN COOPER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN INTERVENTION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A22, is reported at 896 F.2d 1394. The opinions of the district court, Pet. App. A23-A28; J.A. 183-188, and the bankruptcy court, Pet. App. A29-A30; J.A. A112-A113, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1990. The petition for a writ of certiorari was filed on May 8, 1990, and was granted on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 151, 157, 1334, and 1411 of Title 28 of the United States Code are reproduced in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Respondent Ben Cooper, Inc., is an importer and manufacturer of costumes and toys. Petitioners The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. are an insurance company and an insurance brokerage corporation, respectively. After respondent filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, petitioners contracted with the bankruptcy estate (through respondent, as the debtor-in-possession) to insure the *res* of the estate. A fire at one of the estate's facilities led to a dispute over the insurance contract, and the insurance company brought a declaratory judgment action in New York state court to rescind the contract.

As we shall describe more fully below, the bankruptcy court, at respondent's behest, stayed the state court proceedings. Respondent then filed its own adversary proceeding in the bankruptcy court seeking payment of its insurance claim and punitive damages. For their part, petitioners urged the district court to withdraw the proceeding from the bankruptcy court under 28 U.S.C. 157(d) on the grounds that it was not a core proceeding and was triable to a jury as of right. The district court agreed and withdrew the proceeding. In addition, the district court abstained in favor of the state court litigation and dissolved the bankruptcy court's injunction staying that litigation. The court of appeals reversed, holding that the proceedings were core and that the bankruptcy court could preside over a jury trial.

1. This matter commenced in April 1988 when respondent filed its petition for reorganization in the United States District Court for the Southern District of New York. In October 1988, respondent—as the debtor-in-possession of the bankruptcy estate—purchased a policy to insure the estate's commercial facilities.[1] The

[1] The estate was being administered by the debtor-in-possession, as opposed to a trustee. See 11 U.S.C. 1107. Accordingly, peti-

insurance was required under the reorganization plan then pending in the bankruptcy court. Petitioners were aware that the policy was sold to a debtor-in-possession, acting on behalf of a bankruptcy estate, and that the policy's subject matter constituted assets of that estate. Pet. App. A4, A12; see note 1, *supra*.

On January 6, 1989, a fire damaged one of the facilities of the bankruptcy estate. The insurer refused to pay the claim tendered by respondent (as debtor-in-possession) on behalf of the estate. The insurer contended that the policy was invalid because the application had misrepresented the facility to be a warehouse when in fact it was a manufacturing plant. The insurer also asserted that it was not liable on the policy because the claim exaggerated the fire damage. Pet. App. A4-A5.

Subsequently, on April 4, 1989, the bankruptcy court confirmed the reorganization plan. Pet. App. A4. On that date, title to the estate's property was transferred from the estate to respondent. See 11 U.S.C. 541(a), 1141.

On April 18, 1989, the insurer filed an action in New York state court to declare the policy invalid. On May 9, 1989, respondent obtained an order from the bankruptcy court staying the state court proceedings. Soon thereafter, respondent instituted an adversary proceeding in bankruptcy court claiming that the insurer was liable for payment of the insurance claim and that the insurance brokers were liable for negligence if the policy was held void. Petitioners opposed the bankruptcy court's jurisdiction, demanded a jury trial, and moved the district court to withdraw the proceedings. Pet. App. A5-A6.

2. The district court remanded the proceeding to the bankruptcy court and instructed it to determine whether it was "core" or "non-core" under 28 U.S.C. 157. On

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tioners corresponded with and received checks for the insurance premiums from "Ben Cooper, Inc., D.I.P."

remand, the bankruptcy court determined that the proceeding was core. Pet. App. A29-A30; J.A. A112. Then, on petitioners' motion, the district court reexamined the matter and held that the proceeding was not core. Pet. App. A24-A25; J.A. A184-A185. The district court further held that petitioners were entitled to a jury trial. Pet. App. A25-A26; J.A. A185. Believing that bankruptcy courts could not conduct jury trials in non-core proceedings, Pet. App. A25-A26; J.A. A185-A186, the district court withdrew the reference to the bankruptcy court:

> The necessity of preserving [petitioners'] right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157 (d).

Pet. App. A26; J.A. A186; accord Pet. App. A25; J.A. A185. Rather than try the case itself, the district court abstained under 28 U.S.C. 1334(c)(1) and (2) in favor of the action in New York state court and dissolved the bankruptcy court's injunction staying those actions. Pet. App. A26-A28; J.A. A186-A188.

3. Respondent appealed to the Second Circuit, which reversed. Pet. App. A1-A22. The court of appeals held that (1) the dispute was a core bankruptcy proceeding; (2) petitioners had a right to a jury trial; (3) the statute authorizes jury trials in bankruptcy courts; and (4) neither Article III nor the Seventh Amendment bars bankruptcy judges from presiding over such trials. First, the court of appeals held that the proceeding was within the core jurisdiction of the bankruptcy court because it was a "matter[] concerning the administration of the estate" under 28 U.S.C. 157(b)(2)(A). Pet. App. A7. The court relied on several factors in determining that this insurance contract dispute was a core matter: the dispute involves a post-petition contract made with the debtor-in-possession, who serves as an officer of the bankruptcy court; the facility insured was an asset of the estate; insurance of the assets of the estate was part of

the reorganization plan; and petitioners were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. Pet. App. A12. The court of appeals reasoned that Congress intended bankruptcy courts to adjudicate such disputes as core matters, despite the fact that they implicate state law, because they lie "at the heart of the administration of the bankrupt estate." Pet. App. A10. The court of appeals concluded that it "is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." Pet. App. A12.

Second, the court of appeals held that petitioners are entitled to a jury trial because their claims are legal in nature. Pet. App. A17-A18. The court of appeals explained that respondent's dispute with the insurer alleged a breach of contract, while its claims against the insurance brokers alleged negligence and malpractice. *Ibid.* These legal claims for money damages are, the court stated, triable to a jury under the Seventh Amendment. *Ibid.*

Third, the court of appeals held that bankruptcy courts have statutory authority to conduct jury trials in core proceedings. That holding rested on the combined effect of "two separate but related provisions." Pet. App. A19. The first provision, 28 U.S.C. 151, provides that bankruptcy courts "may exercise the authority conferred under this chapter with respect to any action." The second provision, 28 U.S.C. 157(b), states that bankruptcy courts have authority to conduct trials and issue final orders in core proceedings. Reading the two provisions together, the court of appeals reasoned that Congress intended bankruptcy courts to enter final orders in all core proceedings, even those triable to a jury. Pet. App. A19.

Finally, the court of appeals concluded that this authority does not violate Article III of the Constitution or the Seventh Amendment. The court of appeals held that

jury trials in bankruptcy court do not violate the Seventh Amendment, because no facts found by the jury would be reexamined by the district court, which exercises only appellate review over judgments in core bankruptcy proceedings. Pet. App. A20-A21. Nor would jury trials in bankruptcy court violate Article III, because "[i]f bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A21-A22. Accordingly, the court of appeals reversed the district court's judgment and remanded the case to the bankruptcy court. Pet. App. A4.

Petitioners sought review by this Court, citing a conflict between the decision below and a recent decision of the Eighth Circuit holding that bankruptcy courts have no statutory authority to conduct jury trials, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990).[2] On June 28, 1990, this Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. The district court's order withdrawing the reference to the bankruptcy court is properly before this Court, but the Court's decision on the jurisdictional issue will determine what other issues remain to be decided. Standing alone, the order withdrawing the reference to the bankruptcy court is interlocutory and not an appealable "final decision" under either 28 U.S.C. 158(d) or 28 U.S.C. 1291. Because the district court abstained in favor of related state court litigation under 28 U.S.C. 1334(c)(1) and (2), however, and because the abstention decision is an appealable final judgment, the interlocutory order withdrawing the reference "merged" into and became reviewable as part of the final judgment.

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[2] The Eighth Circuit has recently been joined by the Tenth Circuit. See *In re Kaiser Steel Corp.*, No. 90-1013 (Aug. 10, 1990).

By abstaining in favor of the state court litigation, however, the district court brought into play the statutory bar to review of abstention decisions contained in 28 U.S.C. 1334(c)(2). In our view, the bar to review of abstention decisions should not be read to include the antecedent determination whether the case is merely "related to" a case under title 11. Since the instant proceeding is not merely "related to" but rather "arises in" a case under title 11, abstention under Section 1334 (c)(2) was not appropriate and the review bar is inapplicable. If this Court instead determines that the present proceeding is only "related to" a case under title 11, then the review bar applies and the Court should vacate the court of appeals' decision and remand with instructions to dismiss the appeal for want of jurisdiction.

II. Post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157 (b)(2)(A). That Section designates as core bankruptcy proceedings "matters concerning the administration of the estate." Respondent's action to collect a claim based on a post-petition insurance contract covering the estate's assets falls within the literal wording of Section 157 (b)(2)(A). Moreover, the efforts of a trustee or debtor-in-possession to protect the *res* of the estate by insuring its assets fit squarely within long-accepted notions of estate administration.

Section 157(b)(2)(A) cannot be read to include actions on pre-petition contracts, because until a petition is filed in bankruptcy court there is no estate to administer. For this reason, actions to collect on pre-petition accounts receivable like those at issue in *Marathon* cannot be core proceedings under that Section. But where, as here, parties contract with the debtor-in-possession, who is an officer of the bankruptcy court, to insure the *res* of the bankruptcy estate, a dispute over the contract emerging during the pendency of the bankruptcy case is a core proceeding under 28 U.S.C. 157(b)(2)(A).

III. Adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment. The Court need not decide whether jury trials may proceed in bankruptcy court because petitioners are not entitled to a jury trial. By knowingly contracting with a debtor-in-possession to insure the assets of a bankruptcy estate, petitioners voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court and waived any right they may have had to a jury trial. Alternatively, post-petition contractual disputes involving estate administration are so closely intertwined with the public regulatory scheme governing bankruptcies that they are matters of "public right" not triable to a jury.

If petitioners are entitled to a jury trial, that trial should take place in district court because the 1984 Bankruptcy Act does not authorize jury trials in bankruptcy court. Congress deleted the provisions of the 1978 Act authorizing jury trials in bankruptcy court when it enacted the 1984 Act, and Congress's broader purpose in the latter legislation was to curtail the independent powers of bankruptcy judges, one of which was the power to preside over jury trials.

Although Congress did not authorize jury trials in bankruptcy court in the 1984 Act, neither Article III nor the Seventh Amendment prevent it from doing so. If bankruptcy judges can conduct bench trials consistent with Article III—which we believe they can—then the presence of a jury weakens rather than strengthens the Article III challenge. Furthermore, an Article III judge need not preside over a jury trial to comply with the Seventh Amendment.

ARGUMENT

I. THE DISTRICT COURT'S WITHDRAWAL OF THE REFERENCE TO THE BANKRUPTCY COURT IS PROPERLY BEFORE THIS COURT

Although neither the parties nor the court of appeals raised the issue, a substantial question exists concerning this Court's jurisdiction. In our view, the district court's withdrawal of the reference to the bankruptcy court is properly before this Court, but the Court's decision on the jurisdictional issue will determine what other issues remain to be decided.

1. Under 28 U.S.C. 1254, this Court has jurisdiction to review a case from a federal court of appeals by writ of certiorari, provided that the case is "in the court[] of appeals." In other words, the court of appeals must have jurisdiction over a case for this Court to have jurisdiction by writ of certiorari. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 & n.21 (1982); *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974).

If the court of appeals lacks jurisdiction to hear an appeal, this Court also lacks jurisdiction to reach the merits. Under those circumstances, the Court has jurisdiction only to vacate the judgment of the court of appeals and remand with instructions to dismiss the appeal for want of jurisdiction. See, *e.g.*, *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541, 549 (1986).

2. 28 U.S.C. 158(d) states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by a district court or bankruptcy appellate panel on appeal from a bankruptcy court. More generally, 28 U.S.C. 1291 vests jurisdiction in the courts of appeals over "appeals from all final decisions of the district courts of the United States," except where direct review may be sought in the Supreme Court.

The order that respondent appealed to the Second Circuit is ordinarily not a final decision within the meaning

of 28 U.S.C. 158(d) or 28 U.S.C. 1291. The district court entered three orders: it withdrew the reference of the case to the bankruptcy court, it abstained in favor of the state court action, and it dissolved the bankruptcy court's injunction staying that state court litigation. Pet. App. A26-A28; J.A. A186-A128. Respondent appealed only the first of those orders—the district court's withdrawal of the reference to the bankruptcy court. Respondent explicitly said it was not appealing from either the district court's abstention in favor of the state court litigation or from the order dissolving the stay of those proceedings. See Pet. App. A7 ("Cooper does not raise the other issues on which the district court ruled—the decisions to lift the state court stay and to abstain from exercising jurisdiction"); Resp. C.A. Br. 6 & n.* (Cooper appeals the withdrawal of reference "pursuant to 28 U.S.C. § 158(d)"; the abstention decision is "not part of this appeal").

Respondent's tack in the court of appeals raises a serious jurisdictional issue. Indeed, every circuit to have considered the question has concluded that withdrawals of references are not themselves final decisions appealable under either 28 U.S.C. 158(d) or 28 U.S.C. 1291.[3]

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[3] The bankruptcy appeals provision, 28 U.S.C. 158(d), does not by its terms apply to withdrawals of references or any other orders originating with the district court. Section 158(d) confers jurisdiction of the courts of appeals only of final decisions "entered under subsections (a) and (b) of this section." Subsection (b) is not applicable to withdrawals of references or any other orders originating with the district court, because it pertains only to decisions by bankruptcy appellate panels composed of bankruptcy judges. Subsection (a) is also inapplicable, because a district court's decision to withdraw a reference (or any other order originating with the district court) is not a decision of an "appeal[] * * * [or] interlocutory order[] of [a] bankruptcy judge[]." Under 28 U.S.C. 157(d), only the district court has authority to withdraw a reference. Because withdrawals of references necessarily originate in the district court, and not in an appealable or interlocutory order of the bankruptcy court, it follows that the court of appeals had no jurisdiction under 28 U.S.C. 158(d), as respondent contended,

See *In re Powelson*, 878 F.2d 976, 979 (7th Cir. 1989); *In re Chateaugay Corp.*, 826 F.2d 1177, 1179-1180 (2d Cir. 1987); *In re Moens*, 800 F.2d 173, 175-176 (7th Cir. 1986); *In re Kemble*, 776 F.2d 802, 805-806 (9th Cir. 1985); *In re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985) (per curiam); *In re Dalton*, 733 F.2d 710, 714-715 (10th Cir. 1984), cert. dismissed, 469 U.S. 1185 (1985). Nor are withdrawals of references appealable under the collateral order doctrine, see *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), because they are reviewable on appeal from a final judgment. See *In re Powelson*, 878 F.2d at 981; *In re Chateaugay Corp.*, 826 F.2d at 1180; *In re Moens*, 800 F.2d at 176; *In re Kemble*, 776 F.2d at 806; *In re King Memorial Hosp., Inc.*, 767 F.2d at 1510 (per curiam); *In re Dalton*, 733 F.2d at 715. If the district court had gone no further than to withdraw the reference to the bankruptcy court, that decision would have been interlocutory and not appealable to the court of appeals.[4]

Resp. C.A. Br. 6, and as the court of appeals apparently assumed. The court of appeals therefore had jurisdiction under 28 U.S.C. 1291 or not at all. See *In re Powelson*, 878 F.2d 976, 979-980 (7th Cir. 1989); *In re Benny*, 79[illegible] F.2d 712, 716-719 (9th Cir. 1986); *In re Amatex Corp.*, 755 F.2d 1034, 1038 (3d Cir. 1985). This case therefore presents no occasion to decide whether the longer list of appealable items in 28 U.S.C. 158(d) ("final decisions, judgments, orders, and decrees"), as compared to the reference in 28 U.S.C. 1291 to "final decisions," enlarges the class of appealable rulings from bankruptcy courts over those that would be appealable if the district court had decided the matter itself.

[4] Respondent could have asked the district court to certify the case pursuant to 28 U.S.C. 1292(b), see *In re Kaiser Steel Corp.*, No. 90-1013 (10th Cir. Aug. 10, 1990), slip op. 11-12, or petitioned the court of appeals for a writ of mandamus, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d at 1450-1451. But since the certification and timing prerequisites of Section 1292(b) have not been met in this case, and since no mandamus proceeding was begun in the court of appeals, these bases of jurisdiction do not bring this case "in" the court of appeals for purposes of this

3. In this case, however, the district court went on to abstain under 28 U.S.C. 1334(c).[5] The decision to abstain "end[ed] the litigation on the merits," *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), and constituted a final judgment that would ordinarily be appealable under 28 U.S.C. 1291. See *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 8-10 (1983) (*Pullman* abstention decision is a "final decision" for purposes of 28 U.S.C. 1291 because party is "effectively out of court"); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 n.2 (1962) (same). Moreover, because interlocutory rulings "merge" into a final

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Court's jurisdiction under 28 U.S.C. 1254(1). See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 745-746 (1976).

The district court's order dissolving the stay of the state court litigation, although interlocutory, would ordinarily be immediately appealable as an order "granting, continuing, modifying, refusing or dissolving [an] injunction[]," under 28 U.S.C. 1292(a)(1). If the stay order was appealable, the court of appeals might also have had jurisdiction over the district court's decisions to abstain and withdraw the reference either because the latter orders are inextricably bound up with the injunctive order, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938); *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897), or under a pendent appellate jurisdiction theory, see *San Filippo* v. *Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984) (citing cases); *Marathon Oil Co.* v. *United States*, 807 F.2d 759, 765 (9th Cir. 1986). However, since respondent did not appeal from the order dissolving the injunction, Section 1292(a)(1) cannot support the jurisdiction of the Second Circuit (or derivatively, this Court) here. More fundamentally, permitting review of district court orders dissolving stays of state court litigation would impermissibly authorize review of mandatory abstention decisions, in violation of 28 U.S.C. 1334(c)(2). In bankruptcy court, a decision to abstain necessarily includes dissolving the automatic stay of all litigation against the debtor under 11 U.S.C. 362(a) and (d)(1). By closing the front door to judicial review of the mandatory abstention decision in Section 1334(c)(2), Congress could hardly have intended to leave open the back door to review by means of Section 1292(a)(1).

[5] See App., *infra*, 3a-4a.

judgment and become reviewable at that time,[6] the district court's withdrawal of the reference became reviewable when it abstained in favor of the state court litigation.

But there is yet another procedural wrinkle. Although the district court's abstention order constituted a final decision for purposes of 28 U.S.C. 1291, jurisdiction to review that judgment (and the interlocutory order that merged into it) is limited by 28 U.S.C. 1334(c)(2). That Section provides: "Any decision to abstain made under this subsection is not reviewable by appeal or otherwise." To determine the effect of this provision, it is important to understand the two forms of abstention under Section 1334(c). As we explain below, the review bar in subsection (c)(2) applies only to mandatory abstention under that subsection, not to permissive abstention under subsection (c)(1). Although the district court invoked mandatory as well as permissive abstention in this case, subsection (c)(2) should not, in our view, be read to bar review of the condition precedent to mandatory abstention specified in that subsection. Because that condition was not met in this case, the district court's final judgment—and the withdrawal of reference that merged into it—is reviewable on appeal.

Section 1334 outlines two very different forms of abstention. Subsection (c)(1) authorizes permissive abstention. It allows a district court, in the interests of justice or comity, to abstain from hearing a proceeding "arising under title 11 or arising in or related to a case under title 11." In other words, it permits a district

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[6] See, *e.g.*, *Kamen* v. *Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1341 (7th Cir. 1990); *J.A. Jones Constr. Co.* v. *Steel Erectors, Inc.*, 901 F.2d 943, 944 (11th Cir. 1990); *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 682-683 (7th Cir. 1990); *National Pension Fund Benefit Plan A* v. *Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir.), cert. denied, 479 U.S. 971 (1986); *Aaro, Inc.* v. *Daewoo Int'l (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985); *Dickinson* v. *Auto Center Mfg. Co.*, 733 F.2d 1092, 1101-1102 (5th Cir. 1983).

court to abstain in any case within the congressional grant of bankruptcy jurisdiction. See 28 U.S.C. 157(a), 1334(a)-(b). In contrast, subsection (c)(2) sets forth a rule of mandatory abstention. It states that a district court "shall abstain" from hearing a proceeding "related to a case under title 11 but not arising under title 11 or arising in a case under title 11," under certain circumstances.[7] The jurisdictional bar to review of abstention decisions applies only to mandatory abstention decisions, because they are the only "decision[s] to abstain made under this subsection"—that is, subsection (c)(2). By implication, therefore, permissive abstention decisions under subsection (c)(1) are reviewable as final decisions. See *In re China Peak Resort*, 847 F.2d 570, 572 (9th Cir. 1988) (holding permissive abstention decisions reviewable). See generally, *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The district court in this case abstained under subsection (c)(2) (mandatory abstention) as well as subsection (c)(1) (permissive abstention). Its oral decision relied on both subsections of the statute, Pet. App. A26, made findings regarding the conditions prerequisite to mandatory abstention, *ibid.* (only state law issues, timely adjudication available in state court, etc.), and characterized the proceeding as a "related proceeding" that did "not exist independently from Title 11 or the bankruptcy case itself," *id.* at A24-A25. The parties likewise understood the district court to have abstained under both sub-

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[7] Those circumstances are the timely motion of a party, the proceeding being based "upon a State law claim or State law cause of action," the lack of any federal jurisdictional basis other than the bankruptcy jurisdiction, and the commencement of and ability to "timely adjudicate[]" an action in state court. 28 U.S.C. 1334(c)(2).

sections of 28 U.S.C. 1334(c). See Resp. C.A. Br. 6 n.* ("The District Court also determined to abstain pursuant to 28 U.S.C. § 1334(c)(1) and (2) (A-513)."); Pet. C.A. Br. 5.

Although the district court's mandatory abstention decision is "not reviewable by appeal or otherwise" under Section 1334(c)(2), the terms of that provision do not bar review of the district court's antecedent jurisdictional determination that the proceeding is merely "related to" a case under title 11. Cf. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-352 (1976) (district court orders remanding non-civil rights case on grounds not permitted by 28 U.S.C. 1447(c) are not rendered unreviewable by 28 U.S.C. 1447(d), which provides that Section 1447(c) orders are "not reviewable on appeal or otherwise"). To the contrary, the implied reviewability of permissive abstention decisions suggests that the bar to review of mandatory abstention decisions should not be extended beyond the precise category of decisions encompassed by Section 1334(c)(2). The circuit courts to have addressed this issue have distinguished between review of the mandatory abstention decision itself, which is barred, and review of the district court's jurisdiction to order mandatory abstention, which is not barred.[8] See *In re Bobroff*, 766 F.2d 797, 800-802 & n.3 (3d Cir. 1985) (mandatory abstention under 28 U.S.C. 1334(c)(2) presupposes that case is merely "related to" bankruptcy proceeding; predicate determination is reviewable even though abstention decision is not); *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 987-989 (3d Cir. 1984) (same, under provisions of 1978 Act).

In this case, Section 1334(c)(2) does not bar review of the district court's judgment because the condition

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[8] Under this distinction, no review would be permitted of the district court's determination that a motion to abstain had been timely filed, that purely state law claims were at stake, or that the parties could timely adjudicate an action in state court. See 28 U.S.C. 1334(c)(2); note 7, *supra*.

precedent to mandatory abstention is not present. The district court assumed, see Pet. App. A24-A25, and we agree, that cases "related to" a case under title 11 (and therefore candidates for mandatory abstention under 28 U.S.C. 1334(c)(2)) roughly correspond to non-core proceedings, which 28 U.S.C. 157(c) defines as "a proceeding that is not a core proceeding but that is otherwise *related to* a case under title 11" (emphasis added). Conversely, the balance of bankruptcy jurisdiction—which encompasses "cases under title 11" and "civil proceedings arising under" or "arising in" cases under title 11, see 28 U.S.C. 1334(a) and (b)—is subject to permissive abstention. 28 U.S.C. 1334(c)(1). Although no single characteristic connects the statutory list of core proceedings, 28 U.S.C. 157(b)(1) uses the terms "arising under" and "arising in a case under title 11" in describing core proceedings. In sum, the distinction between a matter "arising under or in" a case under title 11 and a matter that is "related" to a case under title 11, appears to be essentially the same distinction as that between core and non-core proceedings. See *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987); *Central Maine Restaurant Supply* v. *Omni Hotel Management Corp.*, 73 Bankr. 1018, 1022 (D. Me. 1987); *In re Corporacion de Servicios Medicos Hospitalarios de Fajardo*, 60 Bankr. 920, 929 (D.P.R. 1986); 1 *Collier on Bankruptcy* ¶ 3.01[2][b][ii], at 3-37 to 3-39 (15th rev. ed. 1990).

For the reasons stated in Point II, *infra*, the present proceeding, involving a contract entered into by the debtor-in-possession on behalf of the estate to insure the assets of the estate, clearly qualifies as a matter "arising in a case under title 11." It is therefore a core proceeding under 28 U.S.C. 157(b)(2)(A) and *not* a candidate for mandatory abstention under 28 U.S.C. 1334(c)(2). If the Court agrees that the instant case is a core proceeding, then mandatory abstention was unauthorized and no jurisdictional obstacle bars this Court's review. However, if the Court finds that this proceeding

is not core, but is merely "related to" a case under title 11, then the prerequisite for mandatory abstention has been met, and the district court's decision was not reviewable, "by appeal or otherwise," in the court of appeals. Cf. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1977) (discussing effect of bar on review of remand orders under similarly worded 28 U.S.C. 1447(d)). In that event, the Court should vacate the court of appeals' judgment and remand with instructions to dismiss the appeal for want of jurisdiction. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. at 549.

II. POST-PETITION CONTRACTUAL DISPUTES INVOLVING ESTATE ADMINISTRATION ARE CORE PROCEEDINGS UNDER 28 U.S.C. 157(b)(2)(A)

The first question presented is whether this dispute—over a post-petition contract to insure the *res* of the bankruptcy estate—may be adjudicated in bankruptcy court as a core proceeding. As background, it is important to understand the nature of a bankruptcy court's "core" jurisdiction.[9]

1. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, vests jurisdiction over bankruptcy proceedings and the debtor's property in the United States District Courts. 28 U.S.C. 1334(a), (b) and (d). The 1984 Act divides the district courts' bankruptcy jurisdiction into two categories: cases

[9] This Court's review should not be limited to the deferential "abuse of discretion" standard applicable to discretionary withdrawals of references, because the district court was not exercising its discretion in this case. To the contrary, the district court felt constrained to withdraw the reference in order to preserve petitioners' Seventh Amendment jury trial right and to comply with 28 U.S.C. 1334(c)(2)'s requirement of mandatory abstention. Pet. App. A26. On remand, the district court will remain free to withdraw the reference in an informed exercise of its discretion. See, *e.g.*, *In re Hipp, Inc.*, 895 F.2d 1503, 1514 (5th Cir. 1990); *Vreugdenhil* v. *Hoekstra*, 773 F.2d 213, 215 (8th Cir. 1985).

under title 11 and core proceedings, on the one hand, and non-core proceedings that are merely "related to" title 11 cases, on the other hand. 28 U.S.C. 157(b)-(c).

In the exercise of their jurisdiction in both core and non-core proceedings, district courts can call for assistance from adjuncts known as bankruptcy courts. Bankruptcy courts are staffed by judges appointed for a fixed term of 14 years by the United States Court of Appeals for the Circuit, and they are removable by the same authority. 28 U.S.C. 152(a) and (e). Bankruptcy courts can adjudicate only such proceedings as are referred to them by the district courts. 28 U.S.C. 157(a)-(c). Even proceedings that are core or are integral to the administration of the bankruptcy estate are not before the bankruptcy court unless the district court orders the reference. See *In re Interpictures, Inc.*, 86 Bankr. 24, 28-29 (Bankr. E.D.N.Y. 1988).

Although bankruptcy courts may participate in core and non-core proceedings, their role depends significantly on the nature of the proceeding. Bankruptcy courts may "hear and determine" core proceedings, subject to at least appellate review by the district court. 28 U.S.C. 157(b)(1). In contrast, the bankruptcy court may only submit recommended findings to the district court in non-core proceedings; absent consent of the parties, the district court must review contested non-core matters *de novo* before entering final judgment. 28 U.S.C. 157(c)(1).

The 1984 Act does not define "core" proceedings, but it does describe them as "arising under title 11, or arising in a case under title 11." 28 U.S.C. 157(b)(1). The Act also sets forth a non-exhaustive list of 15 illustrative core proceedings, including such basic matters as "allowance[s] or disallowance[s] of claims against the estate," 28 U.S.C. 157(b)(2)(B), and—of direct relevance to this case—"matters concerning the administration of the estate," 28 U.S.C. 157(b)(2)(A). The statute further provides that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the

basis that its resolution may be affected by State law." 28 U.S.C. 157(b)(3). The balance of the bankruptcy jurisdiction is comprised of non-core proceedings, which the 1984 Act describes as those "otherwise related to a case under title 11," 28 U.S.C. 157(c)(1).

2. Respondent's action to collect a claim based on a post-petition insurance contract covering the estate's assets (unlike a suit to recover a pre-petition claim) falls within the literal wording of 28 U.S.C. 157(b)(2)(A)—"matters concerning the administration of the estate"—because the claim arose out of the administrative duties of the debtor-in-possession. Those duties are worth stating in some detail. When a debtor files for bankruptcy under Chapter 11, see 11 U.S.C. 1101-1146, as respondent did here, all of its assets are transferred to a new legal entity—the estate. See 11 U.S.C. 541(a); *In re Strangis*, 67 Bankr. 243, 245-246 (Bankr. D. Minn. 1986). At that time, the debtor becomes the "debtor-in-possession," responsible, under 11 U.S.C. 1107, for administering the estate. See *In re V. Savino Oil & Heating Co.*, 99 Bankr. 518, 524-525 (Bankr. E.D.N.Y. 1989) (at the moment of filing the debtor "assumes the mantle of a new juridical entity, a debtor-in-possession"). The bankruptcy court may subsequently appoint a trustee to administer the estate, see 11 U.S.C. 1106, but in the absence of a trustee, as in the present case, the debtor-in-possession shall, with limited exceptions, "perform all the functions and duties * * * of a trustee." 11 U.S.C. 1107(a); see Bankr. R. 9001(10); H.R. Rep. No. 595, 95th Cong., 1st Sess. 404 (1977) (Section 1107 "places a debtor in possession in the shoes of a trustee in every way").

The debtor-in-possession, exercising the role of the trustee, can sue and be sued on behalf of the estate, see 11 U.S.C. 323, 1107, may operate the business on behalf of the estate, 11 U.S.C. 1107, 1108, and is "considered an officer of the court subject to the supervision and control of the Bankruptcy Court and the provisions of the Bankruptcy Code," *In re V. Savino Oil & Heating Co.*, 99 Bankr. at 524; see *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951) ("reorganization trustee is the representative of

the court"); *In re Arnold Print Works, Inc.*, 815 F.2d 165, 170 (1st Cir. 1987); *In re Beck Indus., Inc.*, 725 F.2d 880, 888 (2d Cir. 1984) (Friendly, J.); Act of July 1, 1898, ch. 541, § 1, 30 Stat. 544 (designating a trustee as an "officer").

One of the central roles of the trustee/debtor-in-possession is to preserve the *res* of the estate.[10] In the present case, the proposed bankruptcy reorganization plan mandated that the assets of the estate be insured. See Pet. App. A4; J.A. A156-A157. In fulfillment of that mandate, the respondent, as debtor-in-possession, contracted on behalf of the bankruptcy estate through the insurance brokers with petitioner, The Insurance Company of the State of Pennsylvania, to insure the assets of the estate.

The efforts of a trustee or debtor-in-possession to protect and preserve the *res* of the estate by insuring its assets fit squarely within long-accepted notions of "administration of the estate."[11] Cf. *In re Hood*, 92 Bankr. 648, 651 (Bankr. E.D. Va. 1988) ("The bankruptcy court, of course, has and may exercise extensive jurisdiction over the administration and protection of the property of the estate."), aff'd, 92 Bankr. 656 (E.D. Va. 1988). If insuring the assets qualifies as "administration of the estate," then a dispute arising under an insurance contract to protect the *res*, entered into by the debtor-in-possession under the terms of the bankruptcy reorganization plan, should be considered a "matter concerning the administration of the estate" under 28 U.S.C. 157(b)(2)(A). Cf. *Home Ins. Co.* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746, 748 (7th Cir. 1989) (since a "policy

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[10] *In re Florida Airlines, Inc.*, 110 Bankr. 570, 572 (M.D. Fla. 1990); *In re Nautilus of New Mexico, Inc.*, 83 Bankr. 784, 789 (Bankr. D.N.M. 1988); cf. *United States ex rel. Willoughby* v. *Howard*, 302 U.S. 445, 450-452 (1938) (trustee has a fiduciary duty to care for the estate's funds).

[11] The preservation of the estate is so central to the bankruptcy proceedings that if the trustee/debtor-in-possession fails adequately to perform this task, the Code allows any "entity" to receive compensation for "administrative expenses" incurred for the "preservation of the estate." 11 U.S.C. 503(b)(1)(A).

of insurance is an asset of the estate * * *, a request to determine its validity with respect to the debtor is a 'core proceeding' "); *Aetna Cas. & Sur. Co.* v. *Gamel*, 45 Bankr. 345 (N.D.N.Y. 1984) (question whether the trustee assumed an executory insurance contract is a core matter).

3. If any doubt with respect to the proper classification of this proceeding remains, the legislative history resolves it in favor of designating it "core." As the First Circuit explained:

> [T]he legislative history of the [1984 Act] indicates that Congress intended that "core proceedings" would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95 percent of the proceedings brought before bankruptcy judges would be core proceedings. * * * They used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as "Marathon-type" cases, *see, e.g., id.* [130 Cong. Rec.] at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of "a very limited kind," *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness). Representative Kastenmeier said that "jurisdiction in core bankruptcy proceedings is broader than the summary jurisdiction under pre-1978 law," 130 Cong. Rec. E1108 (daily ed. March 20, 1984), and summary jurisdiction covered post-petition claims.

In re Arnold Print Works, Inc., 815 F.2d at 168.

4. Petitioners argue that this dispute must be considered non-core because state law provides the rule of decision. See Pet. Br. 11, 16. But that theory is belied by 28 U.S.C. 157(b). Many if not most of the core proceedings listed by Congress inevitably require the bankruptcy court to look to state law. For example, subsection (B)—"allowance or disallowance of claims"—necessarily

requires the bankruptcy court to review the validity of state law claims. Subsection (C)—"counterclaims by the estate"—inescapably includes state law counterclaims. And subsection (K)—"determinations of the validity, extent, or priority of liens"—plainly requires the bankruptcy court to adjudicate state law lien issues. The core character of a bankruptcy proceeding is not diminished by the fact that the substantive rights being adjusted are often (indeed, almost always) those created by state law. "It is the nature of the proceeding—its relation to the basic function of the bankruptcy court—not the state or federal basis for the claim, that makes the difference here." *In re Arnold Print Works, Inc.*, 815 F.2d at 169. Congress made this point explicit in the 1984 Act:

> A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

28 U.S.C. 157(b)(3).

Petitioners' contrary conclusion rests on construing the jurisdictional grants relating to core jurisdiction—"arising under title 11, or arising in a case under title 11," 28 U.S.C. 157(b)(1)—to encompass only proceedings that implicate the substantive provisions of the bankruptcy code. Pet. Br. 12-15. Perhaps "arising under title 11" could be given such a limiting construction. See *National City Bank* v. *Coopers & Lybrand*, 802 F.2d 990, 993-994 (8th Cir. 1986) ("arising under" jurisdiction reaches only claims based on a provision of title 11). But cf. *Williams* v. *Austrian*, 331 U.S. 642, 658 (1947) ("arising under" jurisdiction reaches state law disputes involving debtors in federal bankruptcy proceedings); *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934) (same). But the statute does not stop there, and "arising in a case under title 11" cannot be read to reach only those matters unique to bankruptcy. That phrase plainly includes proceedings that arise during the course of, and as a result of, the bankruptcy case. The present case falls within those terms.

5. To be sure, the provision placing matters of estate administration within the core bankruptcy jurisdiction cannot fairly be read to include actions on *pre*-petition contracts. Because no petition has been filed in the bankruptcy court, no estate has been called into being. For this reason, actions to collect on pre-petition accounts receivable—which closely resemble the proceeding at issue in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982)—cannot be core proceedings under 28 U.S.C. 157 (b) (2) (A). See *Windsor Communications Group, Inc.* v. *Grant*, 75 Bankr. 713, 721 (E.D. Pa. 1985); *In re Standard Metals Corp.*, 97 Bankr. 593, 595 (Bankr. D. Colo. 1988); 1 *Collier on Bankruptcy, supra*, ¶ 3.01[2][b][iv], at 3-50.

Petitioners insist that there is no *constitutional* force to the distinction between pre- and post-petition contracts, but that contention presupposes that Article III requires all state law claims to be tried before an Article III judge. Pet. Br. 18-20. The Article III question is addressed in Point III.C., *infra*. For purposes of defining the core jurisdiction of the bankruptcy court under the 1984 Act, it suffices to note that 28 U.S.C. 157(b) (2) (A) does draw that distinction by its reference to the "estate." Moreover, that distinction dates back at least to the 1898 bankruptcy law. See Points III.A and III.C.1, *infra*. It is therefore plausible to argue that *any* dispute that arises concerning any contract entered into post-petition by the trustee or debtor-in-possession concerns the administration of the estate. See 1 *Collier on Bankruptcy, supra*, ¶ 3.01[2][b][iv], at 3-50; see also Pet. App. A12 (core jurisdiction extends to post-petition contracts under 28 U.S.C. 157(b) (2) (A)); *In re Arnold Print Works, Inc.*, 815 F.2d at 168 ("[T]he vast majority of courts that have considered the status of similar post-petition claims have held that they were core proceedings.").[12]

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[12] The "post-petition" cases petitioner cites in support of its position that this dispute is non-core, see Pet. Br. 23-24, concern post-petition *disputes*, not post-petition *contracts*. We agree that post-petition disputes arising out of pre-petition contracts are not

But such a broad argument is unnecessary here. As the court of appeals recognized, Pet. App. A10, Congress plainly intended to include matters that are "at the heart of the administration of the bankruptcy estate" as core matters, and the present case comfortably qualifies as such a matter. Cf. *In re Standard Metals Corp.*, 97 Bankr. at 595. The instant dispute involves a contract entered into by the estate and an insurer during the pendency of the bankruptcy case. The bankruptcy reorganization plan mandated that the debtor-in-possession enter into such a contract on behalf of the estate. The fire creating the damage to the insured assets occurred before the confirmation of the bankruptcy plan. Everything regarding this dispute arose as a result of, and as part of, the bankruptcy case. Because this proceeding arose out of the bankruptcy case and "is inextricably intertwined with the administration of the case," J.A. A112, it is a core matter under 28 U.S.C. 157(b)(2)(A).[13]

III. ADJUDICATING POST-PETITION CONTRACTUAL DISPUTES INVOLVING ESTATE ADMINISTRATION IN THE BANKRUPTCY COURT IS CONSISTENT WITH ARTICLE III AND THE SEVENTH AMENDMENT

Before reaching the question whether a jury trial in a core proceeding in bankruptcy court violates Article III or the Seventh Amendment, the Court should first determine whether petitioners are entitled to a jury trial

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core proceedings under 28 U.S.C. 157(b)(2)(A). For the reasons stated in text, however, disputes over post-petition contracts that involve estate administration are core proceedings under the literal language of Section 157(b)(2)(A).

[13] If this Court disagrees and holds that the case is a non-core proceeding, then that determination should end the inquiry on the merits. As we explained in Point I, *supra*, a finding that this case is non-core is tantamount to a determination that it is merely "related to" a case arising under title 11, and is therefore subject to the mandatory, non-reviewable abstention ordered by the district court pursuant to 28 U.S.C. 1334(c)(2).

and whether the bankruptcy court is statutorily authorized to conduct one.[14]

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[14] These issues are properly before the Court. Alhtough respondent did not cross-petition on petitioners' right to a jury trial, that issue was pressed by the parties in the court of appeals, see Resp. C.A. Br. 30-35, and passed on by the Second Circuit, see Pet. App. A17-A18. Moreover, acceptance of this argument would not enlarge or diminish the court of appeals' judgment. Because petitioners contend that a non-Article III tribunal such as a bankruptcy court cannot conduct a constitutional jury trial, Pet. Br. 43, they are no worse off having a jury trial before a decision-maker unable to conduct one (as they do under the court of appeals' judgment) than they are having no jury trial at all. The issue of petitioners' entitlement to a jury trial is therefore properly before this Court. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 32-33 (1984); *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 n.7 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). Compare *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788-2789 (1989) (declining to review question neither pressed nor passed on by court below).

The issue of statutory authority to conduct jury trials in bankruptcy court is fairly comprised within the second question presented. Determination of what the statute requires is a necessary prerequisite to determining whether the Constitution has been transgressed. Moreover, the conflict between the court of appeals' decision and the Eighth Circuit's decision in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990), is limited to the statutory authority to conduct jury trials in bankruptcy court. Petitioner reprinted the Eighth Circuit's opinion in an appendix, Pet. App. A38-A52, and sought review of that conflict in this Court, see Pet. Reply Br. 3.

In any event, the United States as intervenor should not be bound by the parties' framing of the issues in this case. Had the Attorney General been notified while this case was pending in the court of appeals, as required by Fed. R. App. P. 44 and 28 U.S.C. 2403(a), the government could have intervened and advanced the preceding arguments in defense of the constitutionality of the bankruptcy statute. The point of intervention is to "prevent constitutional or legal issues of potential significance from being decided with only limited input from private litigants, who may care little or nothing about the principles at stake." *Ruotolo* v. *Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978).

A. Petitioners Have No Right To A Jury Trial

If a case involves "public rights," or if a party submits to the equitable jurisdiction of the bankruptcy court, then the proceedings carry no jury trial right. See *Granfinanciera, S.A.* v. *Norberg*, 109 S. Ct. 2782, 2790 n.4, 2796-2797 (1989) (no jury trial right if the case involves public rights); *id.* at 2799-2800 & n.14 (discussing the holding in *Katchen* v. *Landy*, 382 U.S. 323 (1966), that submission to the bankruptcy court's equitable summary jurisdiction waives a party's Seventh Amendment right to a jury trial). Under the 1984 Act, most core proceedings are not triable to a jury as of right because they are public rights proceedings involving traditional bankruptcy matters that are closely integrated to the federal bankruptcy scheme. Many of the remaining core matters, such as adjudication of counterclaims, 28 U.S.C. 157(b)(2)(C), likewise carry no jury trial right because they reflect the long standing principle that a party filing a claim with the estate submits itself to the equitable summary jurisdiction of the bankruptcy court. See *Katchen* v. *Landy*, 382 U.S. 323 (1966); 130 Cong. Rec. 6045-6046 (1984) (prepared statement of Rep. Kastenmeier).

1. *Petitioner Has Consented to The Bankruptcy Court's Equitable Jurisdiction*

An insurance contract dispute would ordinarily be considered a legal dispute triable to a jury as of right under the Seventh Amendment. See Pet. App. A17-A18. By knowingly contracting with a debtor-in-possession to insure the assets of a bankruptcy estate, however, petitioners voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court. Parties who knowingly contract with a trustee or debtor-in-possession "know that they are dealing with an agent responsible to a bankruptcy court." *In re Arnold Print Works, Inc.*, 815 F.2d at 170. "[T]hat the bankruptcy court would resolve sub-

sequent disputes should therefore come as no surprise." *Ibid.*

At least as far back as the 1898 Bankruptcy Act, parties who contracted with a trustee or debtor-in-possession on matters involving the administration of the estate were considered to have contracted with an officer of the court and to have subjected themselves, for purposes of the contract, to the summary jurisdiction of the adjunct bankruptcy court. See Point III.C.1, *supra; In re Arnold Print Works, Inc.*, 815 F.2d at 169-170; *In re California Eastern Airways, Inc.*, 95 F. Supp. 348, 351 (D. Del. 1951); *In re Alan Wood Steel Co.*, 1 Bankr. 167, 169 (Bankr. E.D. Pa. 1979). As the First Circuit held in 1917, by contracting with an officer of a bankruptcy estate, a company subjects itself to the summary jurisdiction of the bankruptcy court:

> * * * [T]he agreement was unmistakably made with officers of that court appointed by it in a pending bankruptcy case, and [the contract] can only be regarded as made and approved by the court for the purposes of that case. An agreement so made is to be regarded as an agreement with the court * * *. And while it remained in force, the court with whom it was so made could order it complied with * * *. *By contracting with the receivers, the company became a quasi party, instead of a stranger to the record, and subjected itself, for the purposes of the contract, to the orders of the [bankruptcy] court.*

In re Hollingsworth & Whitney Co., 242 F. 753, 756 (emphasis added; citations omitted). See also *Governor Clinton Co.* v. *Knott*, 120 F.2d 149, 153 (2d Cir. 1941) ("enforcement of contracts made with the court's officers * * * is a necessary step in the proper administration of the estate, and well within the powers of a bankruptcy court acting essentially as a court of equity"); *Jackson* v. *Moore*, 348 F.2d 437, 440 (5th Cir. 1965) ("The [Bankruptcy] Court had summary jurisdiction to dispose of any controversies affecting the bankrupt estate arising out of the terms of the contract with the Trustee.").

Petitioners were not misled into thinking that they were insuring an ordinary business enterprise. Petitioners knew that respondent was executing the insurance contract not in its individual capacity, but rather in its capacity as representative of the bankruptcy estate and as an official of the bankruptcy court—*viz.*, as debtor-in-possession. Indeed, the correspondence and checks petitioners received from respondent bore the unmistakable legend "Ben Cooper, Inc., D.I.P." See note 1, *supra*. Moreover, petitioners knew the subject matter of the policy was not property of the debtor, but property of the estate. See Pet. App A12. By entering into this contract with the estate, petitioners consented to the bankruptcy court's adjudication of claims arising out of the policy without a jury trial. Cf. *Katchen* v. *Landy*, 382 U.S. 323 (1966).

In *Katchen* v. *Landy*, this Court rejected a defendant's jury trial demand because the defendant had filed a proof of claim against the estate. 382 U.S. at 336-337. As this Court recently explained, "*Katchen* makes clear * * * [that] by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate." *Granfinanciera*, 109 S. Ct. at 2799 n.14, see *Alexander* v. *Hillman*, 296 U.S. 222, 241-252 (1935) (a party who files a claim subjects itself "to all the consequences that attach to an appearance"). Thus, a party that submits itself "to the equitable power of the bankruptcy court" allows otherwise legal claims to be adjudicated by the bankruptcy court without a jury trial. See *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1389-1390 (2d Cir. 1990); *In re Hughes-Bechtol, Inc.*, 107 Bankr. 552, 564-566 (Bankr. S.D. Ohio 1989); *In re Friedberg*, 106 Bankr. 50, 55-56 (Bankr. S.D.N.Y. 1989); cf. *CFTC* v. *Schor*, 478 U.S. 833, 852 (1986) (election of

non-Article III forum waives right to have state-law counterclaim adjudicated in Article III court).

Similarly, petitioners—by knowingly contracting with the debtor-in-possession as a representative of the bankruptcy estate to insure the assets of the estate—voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court. Therefore, the dispute arising under the insurance contract with the estate should be treated as an equitable proceeding that may be tried without a jury in bankruptcy court.

2. *This Dispute Involves "Public Rights" Which Are Not Triable to A Jury As Of Right*

This Court has "long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985). When federal statutory rights are involved, initial administrative adjudication is commonly and properly used to draw upon the expertise of the agency and to relieve the courts of the "serious burden" of full adjudication. *Marathon*, 458 U.S. at 80, 83 (plurality opinion); *Crowell* v. *Benson*, 285 U.S. 22, 54, 57 (1932); *United States* v. *Kras*, 409 U.S. 434, 447 (1973). Accordingly, this Court has held that if a statutory right is either closely intertwined with a federal program that Congress has power to enact, or belongs to or is asserted against the federal government, then Congress may allow a non-Article III entity to adjudicate such "public rights" with limited review by an Article III court. See *Granfinanciera*, 109 S. Ct. at 2797; *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 594. Such public rights need not be tried to a jury even if they are analogous to legal claims that would have been tried to a jury in an action at law. See *Granfinanciera*, 109 S. Ct. at 2790 n.4, 2796-2797; *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450 (1977).

The exact contours of what qualifies as a public right remain unclear, but guidance can be found in *Thomas* v. *Union Carbide Agricultural Products Co.*, *supra*. In *Thomas*, this Court held that Congress could, consistent with Article III, direct that disputes arising among participants in the pesticide registration scheme established by FIFRA (the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*) be resolved by binding arbitration with only limited review available in an Article III court. The Court observed that the FIFRA scheme bore many of the characteristics of a "public" right because the registration system is an integral part of a program safeguarding the public health. 473 U.S. at 589. The Court concluded: "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for * * * limited involvement by the Article III judiciary." *Id.* at 593-594.

This Court has expressly held that public rights cases need not directly involve the United States as a party. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 589-594. Moreover, in *Marathon*, the plurality presumed that in a bankruptcy case disputes concerning the adjustment of the debtor-creditor relationship at the core of the bankruptcy power are public rights. *Marathon*, 458 U.S. at 71 (plurality opinion). Recently, in *Granfinanciera*, the Court reaffirmed *Thomas*'s holding that public rights disputes are not restricted to suits between citizens and the federal government, but include seemingly private disputes if closely integrated into a public regulatory scheme. *Granfinanciera*, 109 S. Ct. at 2797.[15]

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[15] While this Court has expressly rejected the proposition that Congress's power to assign matters to a non-Article III forum is limited to matters where the federal government is a party to the dispute, see *Thomas*, 473 U.S. at 585-586, 594, whether the federal government is a party to the proceedings nonetheless remains a

In determining whether the present dispute involves public rights, the critical focus should be on whether the dispute "is so closely integrated into a public regulatory scheme as to be a matter appropriate for * * * limited involvement by the Article III judiciary." *Thomas*, 473 U.S. at 594. As a first step there must be a "public regulatory scheme."

The federal bankruptcy system is just such a program. It was constituted by Congress through exercise of its Article I power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, Cl. 4; see *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989). This Court has long recognized the broad power vested in Congress by the Constitution to establish a federal bankruptcy scheme. See *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 191-196 (1819) (Marshall, C.J.). Over time, Congress has expanded its exercise of this constitutional authority in order to address manifest public problems. Notably, the first bankruptcy act, and every expansion thereafter before the most recent revisions, followed a major or minor depression. See *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 581-582 n.11 (1935); C. Warren, *Bankruptcy in United States History* (1935). These extensions of the federal bankruptcy scheme have been deemed "funda-

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relevant factor. The federal government's participation as a party is strong evidence that the proceedings involve public rights which may be adjudicated in the first instance by a non-Article III entity. Thus, it is notable that the executive branch is technically a party to every bankruptcy case via the participation of the United States Trustee. The United States Trustees are officers of the executive branch who "represent the public interest" in every bankruptcy case. *In re Revco, D.S., Inc.*, 898 F.2d 498, 500 (6th Cir. 1990), see H.R. Rep. No. 595, 95th Cong., 1st Sess. 109 (1977); Pearson and FitzSimon, *The Role of the United States Trustee*, (pt. 2) 1990-No. 7 Norton Bankruptcy Law Adviser 1 (July 1990). Indeed, the United States Trustee's interests and involvement in bankruptcy matters allow him the right to appeal, even though he has no monetary stake in the proceedings. *In re Revco*, 898 F.2d at 500.

mental and radically progressive [in] nature," and "far reaching." *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 671 (1935). At the same time, these expansions merely constitute "extensions into a field [of constitutional authority] whose boundaries may not yet be fully revealed." *Ibid.*

The current federal bankruptcy scheme provides a unitary federal forum for administration and dispute resolution. This forum facilitates the orderly discharge of indebtedness, equitable distribution of the estate, and rehabilitation of the debtor. Absent a comprehensive federal bankruptcy scheme, ordinary economic forces would frustrate orderly distribution to creditors and preclude rehabilitation.[16] In short, the federal bankruptcy scheme confers a public benefit and implicates the public interest in a way that ordinary suits between private litigants do not. See *Page* v. *Edmunds*, 187 U.S. 596, 605 (1903); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 192 (1902). Thus, the federal bankruptcy system should be considered a "public regulatory scheme" under *Thomas*.

The second inquiry under *Thomas* is whether the specific proceeding at issue is "so closely integrated" to the federal scheme that it should be regarded as involving public rights. The fact that a dispute involves state

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[16] Traditional rights and remedies are inadequate in the context of a bankruptcy because an insolvent by definition has insufficient assets to cover his liabilities, thus precipitating an undesirable rush to judgment and execution that rewards the quickest and most aggressive creditors, perhaps by payment in full, while leaving those less quick or more tolerant to recover nothing. Rehabilitation is impossible where creditors are panicked into desperate efforts to exercise their traditional remedies of execution and foreclosure. Litigation is haphazard and spread out over multiple jurisdictions. The federal bankruptcy scheme protects the debtor from the exercise of traditional creditor remedies by giving a breathing space to enable either a rational liquidation or rehabilitation benefitting both the debtor and creditors and, in the case of a business enterprise, the debtor's employees, customers, suppliers, and owners. See *In re Elcona Homes Corp.*, 863 F.2d 483, 484 (7th Cir. 1988); T. Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986).

law does not mean that it is not integrally related to the federal scheme. In both *Thomas* and *CFTC* v. *Schor*, 478 U.S. at 850-856, this Court found that although the proceedings at issue involved state law they still should be considered integrally related to a federal scheme. In the bankruptcy context, this Court has presumed that disputes concerning the adjustment of the debtor-creditor relationship (that is, the process of allowance and disallowance of claims), although involving state law, should nonetheless be deemed matters concerning public rights. See *Marathon*, 458 U.S. at 71 (plurality opinion); see also 130 Cong. Rec. 6047 (1984) (prepared statement of Rep. Kastenmeier) ("State law rights arising in core bankruptcy proceedings are functionally equivalent to congressionally created rights, because Congress has the power to modify State law rights in bankruptcy proceedings. * * * Indeed the very purpose of bankruptcy is to modify the rights of debtors and creditors.").

But public rights proceedings in bankrupcy should not be limited to the process of allowing and disallowing claims. Other proceedings are also integral to the operation of the federal bankruptcy scheme. For example, disputes regarding the estate's relationship with professional fiduciaries, who are employed to maintain, preserve, and protect the estate, are at the heart of the operation of the federal scheme, even though such disputes often involve state law. Surely, a fee or malpractice dispute between the estate and the trustee or other professionals hired by the estate (*e.g.*, attorneys and accountants) must be subject to adjudication by the bankruptcy court as a matter integrally related to the administration of the estate. See *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 267-268 (1941) ("Under Ch. X of the Chandler Act the bankruptcy court [which included the referee] has plenary power to review all fees and expenses in connection with the reorganization.").

As we explained in Point II, *supra*, this core proceeding involves a post-petition contract to insure the *res* of

the estate and must likewise be considered integrally related to the administration of the estate. See *Governor Clinton Co.* v. *Knott*, 120 F.2d at 153 ("enforcement of contracts made with the court's officers * * * is a necessary step in the proper administration of the estate, and well within the powers of a bankruptcy court acting essentially as a court of equity"). The bankruptcy scheme creates the legal entity the "estate," 11 U.S.C. 541(a), and requires the bankruptcy trustee (or, in the present case, the debtor-in-possession) to preserve and protect the estate. As explained above, see p. 20, *supra*, that task is central to the administration of the estate. In the present case, in performance of this essential role, the debtor-in-possession contracted, on behalf of the estate, to insure the assets of the estate. Because of the importance of preserving the *res* of the estate, the bankruptcy reorganization plan mandated that the assets of the estate be insured. See Pet. App. A4.

Under these circumstances, the post-petition insurance of the assets of the estate should be considered integral to the administration of this estate and thus to the federal bankruptcy scheme. Hence, any dispute regarding an insurance policy entered into by an officer of the court to protect the estate is itself a matter involving public rights.[17]

B. *The Bankruptcy Statute Does Not Authorize Jury Trials in Bankruptcy Court*

If the Court disagrees with the foregoing and concludes that petitioners are entitled to a jury trial, the Court must then determine whether the 1984 Act authorizes jury trials in bankruptcy court.

The 1984 Act is silent on the question. Cf. *Granfinanciera*, 109 S. Ct. at 2790-2791 n.3. The Second Circuit

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[17] The fraudulent conveyance action at issue in *Granfinanciera* is quite different. Prior to the 1984 Act, "[s]uits to recover preferences constitute[d] no part of the proceedings in bankruptcy." 109 S. Ct. at 2794 (quoting *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)); accord *id.* at 2798.

inferred the existence of such statutory authority based on Congress's general intent to allow bankruptcy courts to enter final judgments in all core proceedings. Pet. App. A19. The Eighth and Tenth Circuits have recently rejected that analysis. See *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990); *In re Kaiser Steel Corp.*, No. 90-1013 (10th Cir. Aug. 10, 1990). They held instead that Congress's silence, the absence of any tradition of jury trials in bankruptcy court, and the "serious constitutional problems posed" by an interpretation that would imply such authority, all counseled against such an interpretation. *In re United Missouri Bank*, 901 F.2d at 1455-1457; *In re Kaiser Steel Corp.*, No. 90-1031 (10th Cir. Aug. 10, 1990), slip op. 20-23. We submit that the Eighth and Tenth Circuits reached the correct result.

1. The 1984 Act does not by its terms authorize or forbid jury trials in bankruptcy court, as a brief survey of the statutory text and legislative history reveals. The only language in the Act addressing "the right to trial by jury" appears in 28 U.S.C. 1411:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

This Court has characterized Section 1411 as "notoriously ambiguous" and the legislative history accompanying it as "confused." *Granfinanciera*, 109 S. Ct. at 2789 n.3. What little legislative history exists suggests that Congress was concerned that tort victims' right to a jury trial before the district court in personal injury and wrongful death cases not be lost simply because defendants filed for bankruptcy. See 130 Cong. Rec. 20,228 (1984) (remarks of Rep. Kastenmeier) ("in this narrow range of [personal injury and tort] cases the parties do not lose any right to a jury trial"); 130 Cong. Rec.

20,081 (1984) (remarks of Sen. Thurmond) (Section 1411 provides "that this chapter of title 28 and title 11 do not affect a right to trial by jury * * * with regard to a personal injury or wrongful death tort claim"). This reading of Section 1411 is consistent with 28 U.S.C. 157, which designates personal injury and wrongful death claims as non-core proceedings, 28 U.S.C. 157(b)(2)(B), which are to be tried by a jury before a district court, 28 U.S.C. 157(b)(5). See 130 Cong. Rec. 20,226 (1984) (remarks of Rep. Fish); *id.* at 20,228 (remarks of Rep. Hall).

2. The provision for jury trials in tort cases in the district court does not answer the question whether Congress intended jury trials in bankruptcy court. On the one hand, one might argue that Congress intended all jury trials except for those in tort cases to occur in bankruptcy court. On the other hand, one might argue that Section 1411(b) manifests the Legislature's intention that only the district court, not the bankruptcy court, preside over jury trials. The question in this case, then, is which way the statutory silence cuts. For three reasons, we believe that Congress's silence counsels against authorizing jury trials in bankruptcy court.

First, the 1984 Act reconstituted bankruptcy judges as adjuncts on the model of the United States Magistrates. See, *e.g.*, 130 Cong. Rec. 20,227 (1984) (statement of Rep. Kastenmeier) ("[T]he bill we passed provided that bankruptcy judges shall serve as adjuncts of the Federal district court. * * * These two features were the heart of the House-passed bill. Both of these features have been retained in conference."). Congress was well aware that this Court had approvingly described the constitutional status of magistrates as that of "adjuncts" to the district courts. *Marathon*, 458 U.S. at 77, 79 (plurality opinion); *United States* v. *Raddatz*, 447 U.S. 667, 682, 683 (1980). Magistrates are expressly authorized by statute to conduct jury trials in civil cases when the parties consent. 28 U.S.C. 636(c)(1); see also 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401(a)-(b) (authorizing magistrates to conduct certain criminal misdemeanor trials, including jury trials). By contrast,

bankruptcy judges lack comparable statutory authority. Given the similar adjunct status shared by magistrates and bankruptcy judges, and the use of the magistrate system as a model for the bankruptcy reference system established by the 1984 Act, it is highly unlikely that Congress would have explicitly granted jury trial authority to magistrates and have made no such explicit grant to bankruptcy judges if it intended them both to conduct jury trials. Cf. *Gomez* v. *United States*, 109 S. Ct. 2237, 2242-2246 (1989) (strictly construing "other duties" which magistrates may be assigned).

Second, the Bankruptcy Reform Act of 1978 vested in the bankruptcy courts jurisdiction over all civil actions arising under title 11 or arising in or related to such cases. 28 U.S.C. 1471(b)-(c) (repealed 1984). The broad grant of jurisdiction, combined with 28 U.S.C. 1480, which preserved the parties' rights to jury trials, made unmistakable Congress's intention to hold jury trials in the bankruptcy court. See *Marathon*, 458 U.S. at 55 ("Congress has allowed bankruptcy judges the power to hold jury trials."); H.R. Rep. No. 595, 95th Cong., 1st Sess. 12 (1977) ("Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits.'").

When it enacted the 1984 Act, however, Congress deleted both Sections of the 1978 Act that had been construed to authorize jury trials in bankruptcy court. Thus, while 28 U.S.C. 1411(b)'s predecessor under the 1978 Act (former 28 U.S.C. 1480(b)) allowed the "bankruptcy court" to hold jury trials, the current provision permits only "[t]he district court," to order issues arising under 11 U.S.C. 303 (regarding involuntary petitions) to be tried without a jury. The change from "bankruptcy court" to "district court" in the 1984 Act evidences Congress's intent to have the district court, rather than the bankruptcy court, preside over jury trials.[18]

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[18] Further evidence that Congress did not intend bankruptcy courts to conduct jury trials is provided by Part (d)(1)(D) of the Emergency Rule adopted by the Judicial Conference. That

Third, Congress's broader purpose in the 1984 Act was to curtail the independent authority of bankruptcy judges, among which was the power to preside over jury trials. In passing the 1984 Act, Congress's main objective was to create a bankruptcy court scheme which would avoid the constitutional pitfalls exposed by *Marathon*. See *In re Wood*, 825 F.2d at 95. The *Marathon* Court found that the 1978 Act vested the essential attributes of judicial power in the bankruptcy court, specifically relying on the fact that under the 1978 Act bankruptcy courts could "exercise all ordinary power of district courts, *including the power to preside over jury trials.*" 458 U.S. at 84-85 (emphasis added) (plurality opinion).

In reaction to *Marathon*, Congress carefully placed the "judicial power" over bankruptcy matters in the district court, thus ensuring that the "essential attributes" of judicial power were retained in an Article III court. Compare S. Rep. No. 55, 98th Cong., 1st Sess. 36-37 (1983), with *Marathon*, 458 U.S. at 77-81 (plurality opinion). That is to say, Congress vested all bankruptcy jurisdiction in the district court, not the bankruptcy court. 28 U.S.C. 1334. Only if the district court decides to refer bankruptcy matters to the bankruptcy court does the bankruptcy court have any power. 28 U.S.C. 157(a). And, even if the district court refers a case, the bankruptcy court may enter final judgment only on core matters, subject to district court appellate review. 28 U.S.C. 157(b). Even then, the district court may by rule or order restrict the bankruptcy court's statutory authority. 28 U.S.C. 151. At all times, the district court re-

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provision clearly stated that "bankruptcy judges may not * * * conduct jury trials." The significance of the Judicial Conference's provision is that the 1984 Act is "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operating. * * * The only changes contemplated by our amendment are to add the endorsement of the Congress to the emergency rule * * *." 130 Cong. Rec. 6242 (1984) (statement of Rep. Kindness).

tains power to withdraw any or all proceedings from the bankruptcy court. 28 U.S.C. 157(d).

What appears from the 1984 statute is that Congress carefully avoided cloaking the bankruptcy court with too much judicial authority. Where Congress did provide the bankruptcy court with judicial authority, it did so in a limited sense and it did so expressly. In view of this statutory scheme, and Congress's clear intent to avoid a bankruptcy court that would amount to "an unwarranted encroachment" into the province of the Article III judiciary, it is unreasonable to infer from statutory silence that Congress granted bankruptcy judges the power to preside over jury trials. See *In re Kaiser Steel Corp.*, slip op. 21-23; *In re United Missouri Bank*, 901 F.2d at 1456. That inference is simply inconsistent with Congress's express goal of limiting the juridical authority of bankruptcy judges.[19]

C. A Bankruptcy Court May Conduct A Jury Trial Consistent With Article III And The Seventh Amendment

Although the 1984 Act does not authorize bankruptcy judges to preside over jury trials, such statutory authority would be constitutional.

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[19] The arguments in text indicate that Congress did not confer statutory authority to conduct jury trials on bankruptcy courts, whether the proceeding is core or non-core. If the proceeding is non-core, an additional obstacle stands in the way of construing the 1984 Act to authorize jury trials in bankruptcy court. The review provision governing non-core proceedings provides that the district court must review "de novo those matters to which any party has timely and specifically objected." 28 U.S.C. 157(c)(1). Reading that Section in light of the Seventh Amendment's Re-examination Clause—as one would have to do if bankruptcy judges could preside over jury trials in non-core proceedings—the word "matters" would have to mean different things in bench and jury trials. The awkwardness of that construction is evidence that jury trials in non-core proceedings cannot take place in bankruptcy court.

1. *Holding Jury Trials In Bankruptcy Court Does Not Violate Article III*

The court of appeals below correctly observed that "[*i*]*f* bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A21-A22 (emphasis added). The reason is clear. If bankruptcy judges can conduct bench trials consistent with Article III, then the presence of a jury weakens rather than strengthens the Article III challenge. The principal Article III concern is that the political branches might inappropriately influence adjudicators who lack life tenure and salary protection. See *Marathon*, 458 U.S. at 60 (plurality opinion). Jurors, unlike judges, are not dependent on the government for their offices and therefore are not susceptible to pressure from that source. It follows that if bankruptcy courts can adjudicate claims in bench trials consistent with Article III, that Article does not bar them from holding jury trials.[20]

We therefore return to the issue this Court faced in *Marathon*—whether petitioners are entitled to litigate their claims in an Article III court. *Marathon* held, in brief, that Congress could not constitutionally invest a non-Article III officer with power to hear a pre-petition state contract action only peripherally related to the bankruptcy case. 458 U.S. at 84 (plurality opinion); *id.* at 90 (Rehnquist and O'Connor, JJ., concurring in the judgment).[21] Four crucial differences dictate a different outcome here.

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[20] Cf. *Fields* v. *Washington Metro. Area Transit Auth.*, 743 F.2d 890, 891, 894 (D.C. Cir. 1984) (upholding against Article III challenge jury verdict in trial presided over by magistrate); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1038, 1045 (7th Cir. 1984) (same); *Collins* v. *Foreman*, 729 F.2d 108, 110, 114-120 (2d Cir. 1984) (same); *Goldstein* v. *Kelleher*, 728 F.2d 32, 34 (1st Cir. 1984) (same); *Williams* v. *Mussomelli*, 722 F.2d 1130, 1132 (3d Cir. 1983) (same).

[21] Because *Marathon* had no majority opinion, the only "clear holding" is the limited view expressed in the concurring opinion.

[Continued]

First, the 1984 Act constituting the bankruptcy courts differs materially from the 1978 legislation challenged in *Marathon*. The *Marathon* plurality compared unfavorably the bankruptcy system established by the 1978 Act with the 1898 Act which preceded it. See 458 U.S. at 79 n.31. The 1984 Act removes the objectionable features of the 1978 Act and adopts many aspects of the old referee system of which the plurality spoke approvingly. The current legislation should therefore pass constitutional muster even under the *Marathon* plurality's exacting scrutiny.

Bankruptcy referees under the 1898 Act were adjuncts of the district court. *Marathon*, 458 U.S. at 79-80 n.31 (plurality opinion) ("bankruptcy referees were appointed and removable only by the district court * * * [a]nd the district court retained control over the reference by his power to withdraw the case from the referee"). Under the referee system, the Article III requirement of an independent judiciary was ensured, because "even at the trial stage, the parties had access to an independent judicial officer." 458 U.S. at 79-80 n.31.

The plurality's favorable description of the old referee system supports the constitutionality of the 1984 Act. Whereas the executive branch appointed bankruptcy judges who exercised jurisdiction over bankruptcy matters in the 1978 Act, Article III judges now appoint and remove bankruptcy judges. 28 U.S.C. 152. And whereas the bankruptcy courts themselves exercised the bankruptcy jurisdiction and were virtually independent of the United States District Courts under the 1978 Act, 458 U.S. at 79-80 n.31, the district courts alone exercise jurisdiction over bankruptcy matters under the 1984 Act, 28 U.S.C. 151, 157, 1334. By law, bankruptcy judges are today merely "unit[s]" of the district court. 28 U.S.C. 151. The district courts exercising the bankruptcy jurisdiction now have power to refer some, all, or no bank-

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[21] [Continued]

White Motor Corp. v. *Citibank, N.A.*, 704 F.2d 254, 260 (6th Cir. 1983); see also *Marathon*, 458 U.S. at 92 (Burger, C.J., dissenting); *id.* at 94 n.2 (White, J., dissenting).

ruptcy proceedings to the bankruptcy court;[22] to withdraw a bankruptcy case at any time in their discretion, 28 U.S.C. 157(a) and (d);[23] and to exercise exclusive jurisdiction over withdrawn cases to the exclusion of the bankruptcy courts.[24] As the court of appeals observed in *In re Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990): "[W]e are unsure even that today's bankruptcy courts are 'courts' in a generic sense not defined by Article III." *Id.* at 1514. "[T]oday's bankruptcy courts are arguably at least as much like magistrates or even administrative agencies as they are like other non-Article III courts," *id.* at 1515.

In sum, the 1984 Act largely returned the bankruptcy judges to their previous role as adjuncts of the district courts. *In re Bertoli*, 812 F.2d 136, 139 (3d Cir. 1987). To paraphrase the *Marathon* plurality, bankruptcy litigants under the 1984 Act have access to an independent judicial officer even at the trial stage. Cf. *Marathon*, 458 U.S. at 79 n.31 (plurality opinion). Given the substantial degree of control and supervision of the district courts, statutory authority allowing bankruptcy judges to preside over jury trials in a very limited number of core matters poses no threat to the Article III judiciary. See *In re Mankin*, 823 F.2d 1296, 1308-1310 (9th Cir. 1987); see also *Olympia Hotels Corp.* v. *Johnson Wax*

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[22] See *In re Interpictures, Inc.*, 86 Bankr. at 28-29 (even "core" matters do not have to be referred to the bankruptcy court).

[23] See, *e.g.*, *Ameritel Corp.* v. *Isoetec Communications, Inc.*, 109 Bankr. 965, 967-68 (D. Or. 1990) (withdrawing a core matter); *In re A.H. Robins Co.*, 88 Bankr. 742, 743 (E.D. Va. 1988) (withdrawing entire Chapter 11 case on day petition filed), aff'd, 880 F.2d 694 (4th Cir. 1989); *In re American Community Servs., Inc.*, 86 Bankr. 681 (D. Utah 1988) (withdrawing adversary proceeding a year and a half after complaint filed); *Danning* v. *Lummis (In re Tom Carter Enterprises, Inc.)*, 44 Bankr. 605, 609 (C.D. Cal. 1984) (excepting only *final* decisions of the bankruptcy judge from withdrawal power); see also 1 *Collier on Bankruptcy, supra*, ¶ 3.0-[2][e], at 3-63.

[24] See *UNR Indus., Inc.* v. *Continental Ins. Co.*, 101 Bankr. 524, 526 (N.D. Ill. 1989) (bankruptcy court has no power to grant or withhold approval of a settlement of a withdrawn adversary claim).

Dev. Corp., 908 F.2d 1363, 1368 (7th Cir. 1990) (suggesting that a bankruptcy judge could preside over trials on core matters). The dictates of Article III are accordingly satisfied even under the view of the *Marathon* plurality.

Second, petitioner's *post*-petition dispute in this case stands on a different constitutional footing from the *pre*-petition contract dispute in *Marathon*. As the First Circuit stated, post-petition contracts fell within the summary jurisdiction of the bankruptcy court under the 1898 Act:

> If one examines the jurisdictional history of post-petition claims of the sort in issue here, one finds that they are not "traditional contract actions"; nor are they matters that "historically" have been decided only in the equivalent of Article III courts. To the contrary, bankruptcy courts have adjudicated claims like this one at least since the enactment of the Bankruptcy Act of 1898. Indeed, they have done so in exercise of "summary jurisdiction"—a jurisdiction permitting the bankruptcy court to sit as a court in equity, deciding without a jury matters that a jury might have decided had a party pressed the same claim in a state court.

In re Arnold Print Works, Inc., 815 F.2d at 169. The First Circuit observed that post-petition contracts with an officer of the bankruptcy court (either the trustee or, as here, the debtor-in-possession) were "treated as contracts with the court itself" by which act the contracting party "*subjects himself for the purposes of the contract to the summary jurisdiction of the court.*" 815 F.2d at 170 (emphasis in original; citation omitted). The First Circuit concluded that "the history of bankruptcy court jurisdiction means that a post-petition contract made with a debtor-in-possession cannot be called a 'traditional' state contract action." 815 F.2d at 170; see Point III.A, *supra* (summarizing other authority upholding summary jurisdiction over post-petition disputes in bankruptcy courts).

Petitioner nonetheless insists that Article III should not be understood to distinguish between pre- and post-petition contracts because both involve state law claims.

Pet. Br. 18-20. But even though state law is implicated in both cases, the timing and the relationship of the dispute to the administration of the estate make a critical constitutional difference between pre- and post-petition contractual disputes. Moreover, this Court has not embraced the principle that all state law claims may be tried only in Article III courts (if they are to be adjudicated before a federal tribunal), and it could not adopt petitioner's principle without ruling *ultra vires* the actions of innumerable administrative agencies, see, *e.g.*, *CFTC* v. *Schor*, 478 U.S. at 851-857 (upholding CFTC's jurisdiction over state law counterclaims); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 583; *Crowell* v. *Benson*, 285 U.S. at 51, and legislative courts such as the courts for the territories and the District of Columbia, see *e.g.*, *Palmore* v. *United States*, 411 U.S. 389, 407 (1973); Pet. App. A22, all of which daily adjudicate "private rights" and none of whose judges enjoys life tenure or salary protection. Nearly a century of adjudicating post-petition disputes in non-Article III bankruptcy courts is persuasive evidence that no Article III adjudicator is required.

Third, the need is overwhelming for adjunct bankruptcy judges to have power to enter final judgment on core matters referred to them by district courts. In 1989, 642,993 bankruptcy petitions were filed, and the pending caseload rose to an all-time high of 879,340 petitions. See *Annual Report of the Director of the Administrative Office of the United States Courts* 26-27 (1989). On July 1, 1988, 90,018 adversary proceedings were pending under the bankruptcy code, and during the next year more than 50,000 additional proceedings were filed. *Id.* at 366. If district courts cannot refer bankruptcy proceedings to adjunct bankruptcy courts, Congress could provide a unitary federal bankruptcy forum only by demanding a greater than 50% increase in the efficiency of the district courts (the 575 district judges would have to absorb the workload of 296 bankruptcy judges, see *id.* at 45-46), or, alternatively, Congress could add 296 Article III judgeships, see *ibid.*, which would at one stroke increase the number

of Article III judges by 41%. The first alternative is administratively hopeless; the second jeopardizes the carefully-nurtured institution of Article III judges—"a small group of revered, elite generalists, entrusted with enormous powers of constitutional governance over the other branches and the sovereign states." Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. J. 233, 261 (1989). In sum, the threat to the Article III judiciary as we know it is not that the current bankruptcy judges perform Article III tasks, but that the Article III judges might have to perform the chores now handled by the bankruptcy judges.

Fourth, the absence of any threat to the Judiciary is clarified by this Court's decisions since *Marathon*. "In cases specifically involving the Judicial Branch," this Court has been "vigilan[t] against two dangers:

> first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' *Morrison* v. *Olson*, 487 U.S. [654, 680 (1988)], and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.' *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S., at 851."

Mistretta v. *United States*, 488 U.S. 361, 383 (1989). The provisions of the 1984 Bankruptcy Act present neither danger.

Petitioners do not contend that the 1984 Act burdens the Judiciary with any work it is unsuited to perform. To the contrary, they argue that the 1984 Act withdraws from the superintendence of Article III judges matters that are solely within their provenance. That withdrawal is purportedly accomplished by the provision for appellate-style review in district courts of final decisions entered by bankruptcy courts in core proceedings. See Pet. Br. i, 45.

The 1984 Act does not limit district courts to appellate review of final decisions of bankruptcy courts. The provision in 28 U.S.C. 157(b)(1) that "[b]ankruptcy judges

may hear and determine" core proceedings must be read together with 28 U.S.C. 151, which provides that such authority may be exercised "except as otherwise provided by * * * rule or order of the district court." The latter provision permits the district court to retain *de novo* review over all proceedings referred to the bankruptcy court, even core proceedings. In effect, the 1984 Act merely permits district courts to exercise appellate review over final decisions of bankruptcy courts. That relaxation of otherwise total control over adjunct bankruptcy courts is not mandatory. It mistakes a power for a constraint to say that this provision threatens the institutional integrity of the Judiciary. As in *United States* v. *Raddatz*, 447 U.S. 667 (1980), where this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion, "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685 (Blackmun, J., concurring).

In addition, "clear error" review of final decisions rendered by bankruptcy courts in core proceedings would not insulate the bankruptcy courts from superintendence by the Article III Judiciary. In *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 498-499 (1984), this Court addressed an analogous conflict between the clear error review prescribed by Federal Rule of Civil Procedure 52(a) and the obligation of appellate courts to undertake an independent examination of the whole record in public figure libel cases. This Court observed that "[t]he conflict between the two rules is in some respects more apparent than real," *id.* at 499, because clear error review permits review of the whole record and because the degree of deference to the trial court's findings depends on whether the evidence is testimonial or documentary, whether the trial is long or short, and

whether the inferences drawn are strong or weak, *id.* at 500-501. Although the *Bose* Court concluded that the First Amendment "assigns to judges a constitutional responsibility that cannot be delegated," *id.* at 501, no precedent of this Court incorporates a similar standard in Article III.

Furthermore, appellate review in an Article III court is a sufficient exercise of "the judicial power" to satisfy that Article. Article III does not require that courts staffed by life-tenured judges protected against salary reduction themselves adjudicate from start to finish all cases within the federal judicial competence. The Framers' omission of any requirement that Congress establish federal trial courts makes that point clear; indeed, the lower federal courts did not enjoy federal question jurisdiction until 1875, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. Article III thus invites the holding that "the Constitution gives Congress wide discretion to assign the task of making the initial decision in a case arising under federal law to administrative agencies, but requires judicial review to assure the supremacy of law." Bator, *supra*, 65 Ind. L.J. at 269; see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 918 (1988); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 226-229.

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court made clear that Article III is satisfied when an administrative agency's decision is subject to review in an Article III Court to ensure that it is consistent with law —*i.e.*, that the agency has properly construed and applied the applicable law and that the evidence is sufficient as a matter of law. The Court stated that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.* at 51. Accordingly, the Court held that a non-Article III agency could make factual determinations under a workers' compensation act. *Id.* at 60-61. By the same token, this Court customarily exercises its original jurisdiction

by appointing special masters who need not be Article III judges, and the Court "regularly acts on the basis of the master's report and exceptions thereto." *United States* v. *Raddatz*, 447 U.S. 667, 683 n.11 (1980).

In this troubled and complex area, this Court should uphold, if possible, the attempt by Congress and the President—co-equal branches both, and sworn to uphold the same Constitution—to mark the line between valid and invalid grants of authority.

2. *The Seventh Amendment Does Not Require An Article III Judge to Preside Over A Jury Trial*

Allowing a bankruptcy judge to preside over a jury trial in a core proceeding would not violate a party's Seventh Amendment right. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment issue may be divided into two questions: whether a bankruptcy judge can preside over a jury trial, and whether the district court's review violates the Re-examination Clause.

a. The court of appeals below did not address the question whether a bankruptcy judge can conduct a jury trial. The earliest precedent of this Court bearing on the question appears to be *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899). In that case, the Court held that Congress could provide a jury trial on an appeal taken to an Article III court from a verdict in a jury trial presided over by a District of Columbia justice of the peace. The Supreme Court upheld the statute by holding that the first jury trial was not a Seventh Amendment jury trial, so that the jury trial on appeal (which was before an Article III court and so clearly was a Seventh Amendment jury trial) did not violate the Re-examination Clause. 174 U.S. at 45. Moreover, the Court ruled that

a justice of the peace, alternatively described as a magistrate, *id.* at 18, 31, could not superintend and direct a jury trial within the intendment of the Seventh Amendment. *Id.* at 14-16, 18, 38-39, 43, 45. The Court explained that the superintendence and direction of the jury was part of the Seventh Amendment right, *id.* at 15-16, and that the D.C. justice of the peace did not have the requisite authority, *id.* at 38-39.

Although *Hof* implies that no adjudicator with powers conferred solely by Congress could have sufficient authority to conduct a jury trial guaranteed by the Seventh Amendment, see 174 U.S. at 17, 38-39, this Court rejected the "broad" reading of *Hof* in *Pernell* v. *Southall Realty*, 416 U.S. 363, 380 (1974). The *Pernell* Court held that English justices of the peace presided over jury trials that were "jury trial[s] in the full constitutional sense." *Ibid.* That English justices of the peace were required to be learned in the law, were members of courts of record, and employed procedures similar to those followed in the common law courts sufficed for Seventh Amendment purposes. *Ibid.* Read together, *Hof* and *Pernell* suggest that a sufficiently "judicial" Article I judge may preside over a jury trial consistent with the Seventh Amendment. This conclusion is further supported by the fact that Article I judges of the District of Columbia courts preside over Seventh Amendment jury trials every day, and this Court has never questioned that practice. See 416 U.S. at 367. As one commentator concludes: "Bankruptcy judges, like the *Pernell* superior court judges and unlike the *Hof* justices of the peace, are judges presiding over courts of record. They possess the legal training and ability to instruct jurors on the law, advise them concerning the facts, and set aside inappropriate verdicts. The seventh amendment thus appears to pose no constitutional obstacle to jury trials conducted by bankruptcy judges." Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967, 1037-1038 (1988) (footnotes omitted).

b. The court of appeals did address the Re-examination Clause issue—*i.e.*, whether district court review of jury trials conducted in bankruptcy court would violate the Seventh Amendment. It summarily rejected the argument, pointing out that "[s]ince the jury verdict in a core proceeding is subject only to the traditional standards of appellate review, such proceeding does not violate the Seventh Amendment." Pet. App. A21. The court of appeals' analysis is correct. Section 158 of Title 28 does not require a district court to subject a jury verdict in a core proceeding to review any more stringent than what would be applied by an appellate court. Moreover, the Seventh Amendment expressly permits "re-examination" of a jury verdict "according to the rules of the common law." Appellate review of a jury verdict rendered in a core proceeding would thus not violate the Re-examination Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

2. 28 U.S.C. 157 provides:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b) (1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13, of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334 (c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

3. 28 U.S.C. 1334 provides:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but

not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property wherever located, of the debtor as of the commencement of such case, and of property of the estate.

4. 28 U.S.C. 1411 provides:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

v.

BEN COOPER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE AND BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1784

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

v.

BEN COOPER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION ON BEHALF OF THE UNITED STATES FOR LEAVE TO INTERVENE

The Solicitor General, on behalf of the United States, moves for leave to intervene as a party in this case.

1. On June 28, 1990, this Court granted the petition for a writ of certiorari. 110 S. Ct. 3269. The petition presents two questions for review: (1) "Whether the post-petition status of the contract underlying this case requires a core designation pursuant to 28 U.S.C. § 157 when the contract dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims"; and (2) "Whether a jury trial of this case in the bankruptcy court comports with article III and the seventh amendment of the Constitution when an article I judge presides over the trial subject only to appellate review in the district court."

2. Because the constitutionality of an Act of Congress affecting the public interest is drawn in question in this

case, cf. *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the United States may intervene as of right under 28 U.S.C. 2403(a).* That Section applies "[i]n any action, suit or proceeding in a court of the United States"; 28 U.S.C. 451 defines "court of the United States" to include this Court. See R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 6.16, at 341 (6th ed. 1986) (28 U.S.C. 2403 "applies to the Supreme Court as well as the lower federal courts"). Section 2403(a) by its terms accords the United States "all the rights of a party."

3. To effectuate the United States' right to intervene, 28 U.S.C. 2403(a) further provides that the Attorney General be notified of "any" case wherein "the constitutionality of any Act of Congress affecting the public interest is drawn in question." Accordingly, Federal Rule of Appellate Procedure 44 requires a party challenging the constitutionality of an Act of Congress to notify the court of appeals so that its Clerk can notify the Attorney General. Rule 29.4(b) of the Rules of this Court likewise requires that in any proceeding wherein the constitutionality of an Act of Congress is drawn in question, and the United States is not a party, "the initial pleading, motion, or paper filed in this court shall recite that

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* This Section provides:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

28 U.S.C. 2403(a).

28 U.S.C. § 2403(a) may be applicable." That Rule further provides that in proceedings from any court of the United States, "the initial pleading, motion, or paper shall also state whether or not that court, pursuant to 28 U.S.C. § 2403(a), has certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question."

Notwithstanding these rules, neither party provided the requisite notice, and no certification was provided by the clerk of the court of appeals below. The Solicitor General did not learn that the constitutionality of an Act of Congress was drawn in question in this case until the Court granted certiorari on June 28, 1990. Consequently, the United States had no opportunity to participate in this case before it reached this Court.

4. The United States has a longstanding and significant interest in the Court's resolution of the questions presented in this case. In 1978, after almost ten years of study and investigation, Congress enacted the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (repealed). The 1978 Act represented the first comprehensive revision of the bankruptcy system since 1898. Among other purposes, it was designed to reduce the serious delays in bankruptcy proceedings caused by the crowded dockets of non-bankruptcy courts.

This Court held the 1978 Act's grant of jurisdiction to bankruptcy courts unconstitutional in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In response, Congress enacted the legislation challenged in this case—the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333. Congress, in the 1984 Act, intended to conform the bankruptcy system to the requirements of Article III as determined by this Court. The United States has a profound interest in whether the revised bankruptcy system is found by this Court to comport with constitutional requirements.

5. On consideration of the substantial federal interest in the constitutional question in this case, and the government's statutory authority to intervene as of right with "all the rights of a party," 28 U.S.C. 2403(a), we request the Court to grant the United States leave to intervene. See *Glidden Co.* v. *Zdanok*, 368 U.S. 814, 885 (1961); *International Assoc. of Machinists* v. *Street*, 363 U.S. 825 (1960). See generally R. Stern, E. Gressman & S. Shapiro, *supra*, § 6.16, at 341; *id.* § 6.33, at 380 & n.94.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1990

QUESTIONS PRESENTED

1. Whether post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157(b)(2)(A).

2. Whether adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment.

PARTIES TO THE PROCEEDING

In addition to the captioned parties, the Light Manufacturing Co., Inc., Aimwell Products, Inc., Ben Cooper Sales Corp., Kalvin-Miller International, Inc., and Kerwick & Curran, Inc., are parties to the proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1784

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

v.

BEN COOPER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN INTERVENTION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A22, is reported at 896 F.2d 1394. The opinions of the district court, Pet. App. A23-A28; J.A. 183-188, and the bankruptcy court, Pet. App. A29-A30; J.A. A112-A113, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1990. The petition for a writ of certiorari was filed on May 8, 1990, and was granted on June 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 151, 157, 1334, and 1411 of Title 28 of the United States Code are reproduced in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

Respondent Ben Cooper, Inc., is an importer and manufacturer of costumes and toys. Petitioners The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. are an insurance company and an insurance brokerage corporation, respectively. After respondent filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, petitioners contracted with the bankruptcy estate (through respondent, as the debtor-in-possession) to insure the *res* of the estate. A fire at one of the estate's facilities led to a dispute over the insurance contract, and the insurance company brought a declaratory judgment action in New York state court to rescind the contract.

As we shall describe more fully below, the bankruptcy court, at respondent's behest, stayed the state court proceedings. Respondent then filed its own adversary proceeding in the bankruptcy court seeking payment of its insurance claim and punitive damages. For their part, petitioners urged the district court to withdraw the proceeding from the bankruptcy court under 28 U.S.C. 157(d) on the grounds that it was not a core proceeding and was triable to a jury as of right. The district court agreed and withdrew the proceeding. In addition, the district court abstained in favor of the state court litigation and dissolved the bankruptcy court's injunction staying that litigation. The court of appeals reversed, holding that the proceedings were core and that the bankruptcy court could preside over a jury trial.

1. This matter commenced in April 1988 when respondent filed its petition for reorganization in the United States District Court for the Southern District of New York. In October 1988, respondent—as the debtor-in-possession of the bankruptcy estate—purchased a policy to insure the estate's commercial facilities.[1] The

[1] The estate was being administered by the debtor-in-possession, as opposed to a trustee. See 11 U.S.C. 1107. Accordingly, peti-

insurance was required under the reorganization plan then pending in the bankruptcy court. Petitioners were aware that the policy was sold to a debtor-in-possession, acting on behalf of a bankruptcy estate, and that the policy's subject matter constituted assets of that estate. Pet. App. A4, A12; see note 1, *supra*.

On January 6, 1989, a fire damaged one of the facilities of the bankruptcy estate. The insurer refused to pay the claim tendered by respondent (as debtor-in-possession) on behalf of the estate. The insurer contended that the policy was invalid because the application had misrepresented the facility to be a warehouse when in fact it was a manufacturing plant. The insurer also asserted that it was not liable on the policy because the claim exaggerated the fire damage. Pet. App. A4-A5.

Subsequently, on April 4, 1989, the bankruptcy court confirmed the reorganization plan. Pet. App. A4. On that date, title to the estate's property was transferred from the estate to respondent. See 11 U.S.C. 541(a), 1141.

On April 18, 1989, the insurer filed an action in New York state court to declare the policy invalid. On May 9, 1989, respondent obtained an order from the bankruptcy court staying the state court proceedings. Soon thereafter, respondent instituted an adversary proceeding in bankruptcy court claiming that the insurer was liable for payment of the insurance claim and that the insurance brokers were liable for negligence if the policy was held void. Petitioners opposed the bankruptcy court's jurisdiction, demanded a jury trial, and moved the district court to withdraw the proceedings. Pet. App. A5-A6.

2. The district court remanded the proceeding to the bankruptcy court and instructed it to determine whether it was "core" or "non-core" under 28 U.S.C. 157. On

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tioners corresponded with and received checks for the insurance premiums from "Ben Cooper, Inc., D.I.P."

remand, the bankruptcy court determined that the proceeding was core. Pet. App. A29-A30; J.A. A112. Then, on petitioners' motion, the district court reexamined the matter and held that the proceeding was not core. Pet. App. A24-A25; J.A. A184-A185. The district court further held that petitioners were entitled to a jury trial. Pet. App. A25-A26; J.A. A185. Believing that bankruptcy courts could not conduct jury trials in non-core proceedings, Pet. App. A25-A26; J.A. A185-A186, the district court withdrew the reference to the bankruptcy court:

> The necessity of preserving [petitioners'] right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157 (d).

Pet. App. A26; J.A. A186; accord Pet. App. A25; J.A. A185. Rather than try the case itself, the district court abstained under 28 U.S.C. 1334(c)(1) and (2) in favor of the action in New York state court and dissolved the bankruptcy court's injunction staying those actions. Pet. App. A26-A28; J.A. A186-A188.

3. Respondent appealed to the Second Circuit, which reversed. Pet. App. A1-A22. The court of appeals held that (1) the dispute was a core bankruptcy proceeding; (2) petitioners had a right to a jury trial; (3) the statute authorizes jury trials in bankruptcy courts; and (4) neither Article III nor the Seventh Amendment bars bankruptcy judges from presiding over such trials. First, the court of appeals held that the proceeding was within the core jurisdiction of the bankruptcy court because it was a "matter[] concerning the administration of the estate" under 28 U.S.C. 157(b)(2)(A). Pet. App. A7. The court relied on several factors in determining that this insurance contract dispute was a core matter: the dispute involves a post-petition contract made with the debtor-in-possession, who serves as an officer of the bankruptcy court; the facility insured was an asset of the estate; insurance of the assets of the estate was part of

the reorganization plan; and petitioners were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. Pet. App. A12. The court of appeals reasoned that Congress intended bankruptcy courts to adjudicate such disputes as core matters, despite the fact that they implicate state law, because they lie "at the heart of the administration of the bankrupt estate." Pet. App. A10. The court of appeals concluded that it "is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." Pet. App. A12.

Second, the court of appeals held that petitioners are entitled to a jury trial because their claims are legal in nature. Pet. App. A17-A18. The court of appeals explained that respondent's dispute with the insurer alleged a breach of contract, while its claims against the insurance brokers alleged negligence and malpractice. *Ibid.* These legal claims for money damages are, the court stated, triable to a jury under the Seventh Amendment. *Ibid.*

Third, the court of appeals held that bankruptcy courts have statutory authority to conduct jury trials in core proceedings. That holding rested on the combined effect of "two separate but related provisions." Pet. App. A19. The first provision, 28 U.S.C. 151, provides that bankruptcy courts "may exercise the authority conferred under this chapter with respect to any action." The second provision, 28 U.S.C. 157(b), states that bankruptcy courts have authority to conduct trials and issue final orders in core proceedings. Reading the two provisions together, the court of appeals reasoned that Congress intended bankruptcy courts to enter final orders in all core proceedings, even those triable to a jury. Pet. App. A19.

Finally, the court of appeals concluded that this authority does not violate Article III of the Constitution or the Seventh Amendment. The court of appeals held that

jury trials in bankruptcy court do not violate the Seventh Amendment, because no facts found by the jury would be reexamined by the district court, which exercises only appellate review over judgments in core bankruptcy proceedings. Pet. App. A20-A21. Nor would jury trials in bankruptcy court violate Article III, because "[i]f bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A21-A22. Accordingly, the court of appeals reversed the district court's judgment and remanded the case to the bankruptcy court. Pet. App. A4.

Petitioners sought review by this Court, citing a conflict between the decision below and a recent decision of the Eighth Circuit holding that bankruptcy courts have no statutory authority to conduct jury trials, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990).[2] On June 28, 1990, this Court granted the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

I. The district court's order withdrawing the reference to the bankruptcy court is properly before this Court, but the Court's decision on the jurisdictional issue will determine what other issues remain to be decided. Standing alone, the order withdrawing the reference to the bankruptcy court is interlocutory and not an appealable "final decision" under either 28 U.S.C. 158(d) or 28 U.S.C. 1291. Because the district court abstained in favor of related state court litigation under 28 U.S.C. 1334(c)(1) and (2), however, and because the abstention decision is an appealable final judgment, the interlocutory order withdrawing the reference "merged" into and became reviewable as part of the final judgment.

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[2] The Eighth Circuit has recently been joined by the Tenth Circuit. See *In re Kaiser Steel Corp.*, No. 90-1013 (Aug. 10, 1990).

By abstaining in favor of the state court litigation, however, the district court brought into play the statutory bar to review of abstention decisions contained in 28 U.S.C. 1334(c)(2). In our view, the bar to review of abstention decisions should not be read to include the antecedent determination whether the case is merely "related to" a case under title 11. Since the instant proceeding is not merely "related to" but rather "arises in" a case under title 11, abstention under Section 1334 (c)(2) was not appropriate and the review bar is inapplicable. If this Court instead determines that the present proceeding is only "related to" a case under title 11, then the review bar applies and the Court should vacate the court of appeals' decision and remand with instructions to dismiss the appeal for want of jurisdiction.

II. Post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157 (b)(2)(A). That Section designates as core bankruptcy proceedings "matters concerning the administration of the estate." Respondent's action to collect a claim based on a post-petition insurance contract covering the estate's assets falls within the literal wording of Section 157 (b)(2)(A). Moreover, the efforts of a trustee or debtor-in-possession to protect the *res* of the estate by insuring its assets fit squarely within long-accepted notions of estate administration.

Section 157(b)(2)(A) cannot be read to include actions on pre-petition contracts, because until a petition is filed in bankruptcy court there is no estate to administer. For this reason, actions to collect on pre-petition accounts receivable like those at issue in *Marathon* cannot be core proceedings under that Section. But where, as here, parties contract with the debtor-in-possession, who is an officer of the bankruptcy court, to insure the *res* of the bankruptcy estate, a dispute over the contract emerging during the pendency of the bankruptcy case is a core proceeding under 28 U.S.C. 157(b)(2)(A).

III. Adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment. The Court need not decide whether jury trials may proceed in bankruptcy court because petitioners are not entitled to a jury trial. By knowingly contracting with a debtor-in-possession to insure the assets of a bankruptcy estate, petitioners voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court and waived any right they may have had to a jury trial. Alternatively, post-petition contractual disputes involving estate administration are so closely intertwined with the public regulatory scheme governing bankruptcies that they are matters of "public right" not triable to a jury.

If petitioners are entitled to a jury trial, that trial should take place in district court because the 1984 Bankruptcy Act does not authorize jury trials in bankruptcy court. Congress deleted the provisions of the 1978 Act authorizing jury trials in bankruptcy court when it enacted the 1984 Act, and Congress's broader purpose in the latter legislation was to curtail the independent powers of bankruptcy judges, one of which was the power to preside over jury trials.

Although Congress did not authorize jury trials in bankruptcy court in the 1984 Act, neither Article III nor the Seventh Amendment prevent it from doing so. If bankruptcy judges can conduct bench trials consistent with Article III—which we believe they can—then the presence of a jury weakens rather than strengthens the Article III challenge. Furthermore, an Article III judge need not preside over a jury trial to comply with the Seventh Amendment.

ARGUMENT

I. THE DISTRICT COURT'S WITHDRAWAL OF THE REFERENCE TO THE BANKRUPTCY COURT IS PROPERLY BEFORE THIS COURT

Although neither the parties nor the court of appeals raised the issue, a substantial question exists concerning this Court's jurisdiction. In our view, the district court's withdrawal of the reference to the bankruptcy court is properly before this Court, but the Court's decision on the jurisdictional issue will determine what other issues remain to be decided.

1. Under 28 U.S.C. 1254, this Court has jurisdiction to review a case from a federal court of appeals by writ of certiorari, provided that the case is "in the court[] of appeals." In other words, the court of appeals must have jurisdiction over a case for this Court to have jurisdiction by writ of certiorari. See *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 & n.21 (1982); *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974).

If the court of appeals lacks jurisdiction to hear an appeal, this Court also lacks jurisdiction to reach the merits. Under those circumstances, the Court has jurisdiction only to vacate the judgment of the court of appeals and remand with instructions to dismiss the appeal for want of jurisdiction. See, *e.g.*, *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541, 549 (1986).

2. 28 U.S.C. 158(d) states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered by a district court or bankruptcy appellate panel on appeal from a bankruptcy court. More generally, 28 U.S.C. 1291 vests jurisdiction in the courts of appeals over "appeals from all final decisions of the district courts of the United States," except where direct review may be sought in the Supreme Court.

The order that respondent appealed to the Second Circuit is ordinarily not a final decision within the meaning

of 28 U.S.C. 158(d) or 28 U.S.C. 1291. The district court entered three orders: it withdrew the reference of the case to the bankruptcy court, it abstained in favor of the state court action, and it dissolved the bankruptcy court's injunction staying that state court litigation. Pet. App. A26-A28; J.A. A186-A128. Respondent appealed only the first of those orders—the district court's withdrawal of the reference to the bankruptcy court. Respondent explicitly said it was not appealing from either the district court's abstention in favor of the state court litigation or from the order dissolving the stay of those proceedings. See Pet. App. A7 ("Cooper does not raise the other issues on which the district court ruled—the decisions to lift the state court stay and to abstain from exercising jurisdiction"); Resp. C.A. Br. 6 & n.* (Cooper appeals the withdrawal of reference "pursuant to 28 U.S.C. § 158(d)"; the abstention decision is "not part of this appeal").

Respondent's tack in the court of appeals raises a serious jurisdictional issue. Indeed, every circuit to have considered the question has concluded that withdrawals of references are not themselves final decisions appealable under either 28 U.S.C. 158(d) or 28 U.S.C. 1291.[3]

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[3] The bankruptcy appeals provision, 28 U.S.C. 158(d), does not by its terms apply to withdrawals of references or any other orders originating with the district court. Section 158(d) confers jurisdiction of the courts of appeals only of final decisions "entered under subsections (a) and (b) of this section." Subsection (b) is not applicable to withdrawals of references or any other orders originating with the district court, because it pertains only to decisions by bankruptcy appellate panels composed of bankruptcy judges. Subsection (a) is also inapplicable, because a district court's decision to withdraw a reference (or any other order originating with the district court) is not a decision of an "appeal[] * * * [or] interlocutory order[] of [a] bankruptcy judge[]." Under 28 U.S.C. 157(d), only the district court has authority to withdraw a reference. Because withdrawals of references necessarily originate in the district court, and not in an appealable or interlocutory order of the bankruptcy court, it follows that the court of appeals had no jurisdiction under 28 U.S.C. 158(d), as respondent contended,

See *In re Powelson*, 878 F.2d 976, 979 (7th Cir. 1989); *In re Chateaugay Corp.*, 826 F.2d 1177, 1179-1180 (2d Cir. 1987); *In re Moens*, 800 F.2d 173, 175-176 (7th Cir. 1986); *In re Kemble*, 776 F.2d 802, 805-806 (9th Cir. 1985); *In re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985) (per curiam); *In re Dalton*, 733 F.2d 710, 714-715 (10th Cir. 1984), cert. dismissed, 469 U.S. 1185 (1985). Nor are withdrawals of references appealable under the collateral order doctrine, see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), because they are reviewable on appeal from a final judgment. See *In re Powelson*, 878 F.2d at 981; *In re Chateaugay Corp.*, 826 F.2d at 1180; *In re Moens*, 800 F.2d at 176; *In re Kemble*, 776 F.2d at 806; *In re King Memorial Hosp., Inc.*, 767 F.2d at 1510 (per curiam); *In re Dalton*, 733 F.2d at 715. If the district court had gone no further than to withdraw the reference to the bankruptcy court, that decision would have been interlocutory and not appealable to the court of appeals.[4]

Resp. C.A. Br. 6, and as the court of appeals apparently assumed. The court of appeals therefore had jurisdiction under 28 U.S.C. 1291 or not at all. See *In re Powelson*, 878 F.2d 976, 979-980 (7th Cir. 1989); *In re Benny*, 791 F.2d 712, 716-719 (9th Cir. 1986); *In re Amatex Corp.*, 755 F.2d 1034, 1038 (3d Cir. 1985). This case therefore presents no occasion to decide whether the longer list of appealable items in 28 U.S.C. 158(d) ("final decisions, judgments, orders, and decrees"), as compared to the reference in 28 U.S.C. 1291 to "final decisions," enlarges the class of appealable rulings from bankruptcy courts over those that would be appealable if the district court had decided the matter itself.

[4] Respondent could have asked the district court to certify the case pursuant to 28 U.S.C. 1292(b), see *In re Kaiser Steel Corp.*, No. 90-1013 (10th Cir. Aug. 10, 1990), slip op. 11-12, or petitioned the court of appeals for a writ of mandamus, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d at 1450-1451. But since the certification and timing prerequisites of Section 1292(b) have not been met in this case, and since no mandamus proceeding was begun in the court of appeals, these bases of jurisdiction do not bring this case "in" the court of appeals for purposes of this

3. In this case, however, the district court went on to abstain under 28 U.S.C. 1334(c).[5] The decision to abstain "end[ed] the litigation on the merits," *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), and constituted a final judgment that would ordinarily be appealable under 28 U.S.C. 1291. See *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 8-10 (1983) (*Pullman* abstention decision is a "final decision" for purposes of 28 U.S.C. 1291 because party is "effectively out of court"); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 n.2 (1962) (same). Moreover, because interlocutory rulings "merge" into a final

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Court's jurisdiction under 28 U.S.C. 1254(1). See *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 745-746 (1976).

The district court's order dissolving the stay of the state court litigation, although interlocutory, would ordinarily be immediately appealable as an order "granting, continuing, modifying, refusing or dissolving [an] injunction[]," under 28 U.S.C. 1292(a)(1). If the stay order was appealable, the court of appeals might also have had jurisdiction over the district court's decisions to abstain and withdraw the reference either because the latter orders are inextricably bound up with the injunctive order, see *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938); *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897), or under a pendent appellate jurisdiction theory, see *San Filippo* v. *Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984) (citing cases); *Marathon Oil Co.* v. *United States*, 807 F.2d 759, 765 (9th Cir. 1986). However, since respondent did not appeal from the order dissolving the injunction, Section 1292(a)(1) cannot support the jurisdiction of the Second Circuit (or derivatively, this Court) here. More fundamentally, permitting review of district court orders dissolving stays of state court litigation would impermissibly authorize review of mandatory abstention decisions, in violation of 28 U.S.C. 1334(c)(2). In bankruptcy court, a decision to abstain necessarily includes dissolving the automatic stay of all litigation against the debtor under 11 U.S.C. 362(a) and (d)(1). By closing the front door to judicial review of the mandatory abstention decision in Section 1334(c)(2), Congress could hardly have intended to leave open the back door to review by means of Section 1292(a)(1).

[5] See App., *infra*, 3a-4a.

judgment and become reviewable at that time,[6] the district court's withdrawal of the reference became reviewable when it abstained in favor of the state court litigation.

But there is yet another procedural wrinkle. Although the district court's abstention order constituted a final decision for purposes of 28 U.S.C. 1291, jurisdiction to review that judgment (and the interlocutory order that merged into it) is limited by 28 U.S.C. 1334(c)(2). That Section provides: "Any decision to abstain made under this subsection is not reviewable by appeal or otherwise." To determine the effect of this provision, it is important to understand the two forms of abstention under Section 1334(c). As we explain below, the review bar in subsection (c)(2) applies only to mandatory abstention under that subsection, not to permissive abstention under subsection (c)(1). Although the district court invoked mandatory as well as permissive abstention in this case, subsection (c)(2) should not, in our view, be read to bar review of the condition precedent to mandatory abstention specified in that subsection. Because that condition was not met in this case, the district court's final judgment—and the withdrawal of reference that merged into it—is reviewable on appeal.

Section 1334 outlines two very different forms of abstention. Subsection (c)(1) authorizes permissive abstention. It allows a district court, in the interests of justice or comity, to abstain from hearing a proceeding "arising under title 11 or arising in or related to a case under title 11." In other words, it permits a district

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[6] See, *e.g.*, *Kamen* v. *Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1341 (7th Cir. 1990); *J.A. Jones Constr. Co.* v. *Steel Erectors, Inc.*, 901 F.2d 943, 944 (11th Cir. 1990); *Bastian* v. *Petren Resources Corp.*, 892 F.2d 680, 682-683 (7th Cir. 1990); *National Pension Fund Benefit Plan A* v. *Cooper Indus., Inc.*, 789 F.2d 21, 24 (D.C. Cir.), cert. denied, 479 U.S. 971 (1986); *Aaro, Inc.* v. *Daewoo Int'l (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985); *Dickinson* v. *Auto Center Mfg. Co.*, 733 F.2d 1092, 1101-1102 (5th Cir. 1983).

court to abstain in any case within the congressional grant of bankruptcy jurisdiction. See 28 U.S.C. 157(a), 1334(a)-(b). In contrast, subsection (c)(2) sets forth a rule of mandatory abstention. It states that a district court "shall abstain" from hearing a proceeding "related to a case under title 11 but not arising under title 11 or arising in a case under title 11," under certain circumstances.[7] The jurisdictional bar to review of abstention decisions applies only to mandatory abstention decisions, because they are the only "decision[s] to abstain made under this subsection"—that is, subsection (c)(2). By implication, therefore, permissive abstention decisions under subsection (c)(1) are reviewable as final decisions. See *In re China Peak Resort*, 847 F.2d 570, 572 (9th Cir. 1988) (holding permissive abstention decisions reviewable). See generally, *General Motors Corp.* v. *United States*, 110 S. Ct. 2528, 2532 (1990) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

The district court in this case abstained under subsection (c)(2) (mandatory abstention) as well as subsection (c)(1) (permissive abstention). Its oral decision relied on both subsections of the statute, Pet. App. A26, made findings regarding the conditions prerequisite to mandatory abstention, *ibid.* (only state law issues, timely adjudication available in state court, etc.), and characterized the proceeding as a "related proceeding" that did "not exist independently from Title 11 or the bankruptcy case itself," *id.* at A24-A25. The parties likewise understood the district court to have abstained under both sub-

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[7] Those circumstances are the timely motion of a party, the proceeding being based "upon a State law claim or State law cause of action," the lack of any federal jurisdictional basis other than the bankruptcy jurisdiction, and the commencement of and ability to "timely adjudicate[]" an action in state court. 28 U.S.C. 1334(c)(2).

sections of 28 U.S.C. 1334(c). See Resp. C.A. Br. 6 n.* ("The District Court also determined to abstain pursuant to 28 U.S.C. § 1334(c)(1) and (2) (A-513)."); Pet. C.A. Br. 5.

Although the district court's mandatory abstention decision is "not reviewable by appeal or otherwise" under Section 1334(c)(2), the terms of that provision do not bar review of the district court's antecedent jurisdictional determination that the proceeding is merely "related to" a case under title 11. Cf. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 345-352 (1976) (district court orders remanding non-civil rights case on grounds not permitted by 28 U.S.C. 1447(c) are not rendered unreviewable by 28 U.S.C. 1447(d), which provides that Section 1447(c) orders are "not reviewable on appeal or otherwise"). To the contrary, the implied reviewability of permissive abstention decisions suggests that the bar to review of mandatory abstention decisions should not be extended beyond the precise category of decisions encompassed by Section 1334(c)(2). The circuit courts to have addressed this issue have distinguished between review of the mandatory abstention decision itself, which is barred, and review of the district court's jurisdiction to order mandatory abstention, which is not barred.[8] See *In re Bobroff*, 766 F.2d 797, 800-802 & n.3 (3d Cir. 1985) (mandatory abstention under 28 U.S.C. 1334(c)(2) presupposes that case is merely "related to" bankruptcy proceeding; predicate determination is reviewable even though abstention decision is not); *Pacor, Inc.* v. *Higgins*, 743 F.2d 984, 987-989 (3d Cir. 1984) (same, under provisions of 1978 Act).

In this case, Section 1334(c)(2) does not bar review of the district court's judgment because the condition

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[8] Under this distinction, no review would be permitted of the district court's determination that a motion to abstain had been timely filed, that purely state law claims were at stake, or that the parties could timely adjudicate an action in state court. See 28 U.S.C. 1334(c)(2); note 7, *supra*.

precedent to mandatory abstention is not present. The district court assumed, see Pet. App. A24-A25, and we agree, that cases "related to" a case under title 11 (and therefore candidates for mandatory abstention under 28 U.S.C. 1334(c)(2)) roughly correspond to non-core proceedings, which 28 U.S.C. 157(c) defines as "a proceeding that is not a core proceeding but that is otherwise *related to* a case under title 11" (emphasis added). Conversely, the balance of bankruptcy jurisdiction—which encompasses "cases under title 11" and "civil proceedings arising under" or "arising in" cases under title 11, see 28 U.S.C. 1334(a) and (b)—is subject to permissive abstention. 28 U.S.C. 1334(c)(1). Although no single characteristic connects the statutory list of core proceedings, 28 U.S.C. 157(b)(1) uses the terms "arising under" and "arising in a case under title 11" in describing core proceedings. In sum, the distinction between a matter "arising under or in" a case under title 11 and a matter that is "related" to a case under title 11, appears to be essentially the same distinction as that between core and non-core proceedings. See *In re Wood*, 825 F.2d 90, 96-97 (5th Cir. 1987); *Central Maine Restaurant Supply* v. *Omni Hotel Management Corp.*, 73 Bankr. 1018, 1022 (D. Me. 1987); *In re Corporacion de Servicios Medicos Hospitalarios de Fajardo*, 60 Bankr. 920, 929 (D.P.R. 1986); 1 *Collier on Bankruptcy* ¶ 3.01[2][b][ii], at 3-37 to 3-39 (15th rev. ed. 1990).

For the reasons stated in Point II, *infra*, the present proceeding, involving a contract entered into by the debtor-in-possession on behalf of the estate to insure the assets of the estate, clearly qualifies as a matter "arising in a case under title 11." It is therefore a core proceeding under 28 U.S.C. 157(b)(2)(A) and *not* a candidate for mandatory abstention under 28 U.S.C. 1334(c)(2). If the Court agrees that the instant case is a core proceeding, then mandatory abstention was unauthorized and no jurisdictional obstacle bars this Court's review. However, if the Court finds that this proceeding

is not core, but is merely "related to" a case under title 11, then the prerequisite for mandatory abstention has been met, and the district court's decision was not reviewable, "by appeal or otherwise," in the court of appeals. Cf. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1977) (discussing effect of bar on review of remand orders under similarly worded 28 U.S.C. 1447(d)). In that event, the Court should vacate the court of appeals' judgment and remand with instructions to dismiss the appeal for want of jurisdiction. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. at 549.

II. POST-PETITION CONTRACTUAL DISPUTES INVOLVING ESTATE ADMINISTRATION ARE CORE PROCEEDINGS UNDER 28 U.S.C. 157(b)(2)(A)

The first question presented is whether this dispute—over a post-petition contract to insure the *res* of the bankruptcy estate—may be adjudicated in bankruptcy court as a core proceeding. As background, it is important to understand the nature of a bankruptcy court's "core" jurisdiction.[9]

1. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, vests jurisdiction over bankruptcy proceedings and the debtor's property in the United States District Courts. 28 U.S.C. 1334(a), (b) and (d). The 1984 Act divides the district courts' bankruptcy jurisdiction into two categories: cases

[9] This Court's review should not be limited to the deferential "abuse of discretion" standard applicable to discretionary withdrawals of references, because the district court was not exercising its discretion in this case. To the contrary, the district court felt constrained to withdraw the reference in order to preserve petitioners' Seventh Amendment jury trial right and to comply with 28 U.S.C. 1334(c)(2)'s requirement of mandatory abstention. Pet. App. A26. On remand, the district court will remain free to withdraw the reference in an informed exercise of its discretion. See, *e.g.*, *In re Hipp, Inc.*, 895 F.2d 1503, 1514 (5th Cir. 1990); *Vreugdenhil* v. *Hoekstra*, 773 F.2d 213, 215 (8th Cir. 1985).

under title 11 and core proceedings, on the one hand, and non-core proceedings that are merely "related to" title 11 cases, on the other hand. 28 U.S.C. 157(b)-(c).

In the exercise of their jurisdiction in both core and non-core proceedings, district courts can call for assistance from adjuncts known as bankruptcy courts. Bankruptcy courts are staffed by judges appointed for a fixed term of 14 years by the United States Court of Appeals for the Circuit, and they are removable by the same authority. 28 U.S.C. 152(a) and (e). Bankruptcy courts can adjudicate only such proceedings as are referred to them by the district courts. 28 U.S.C. 157(a)-(c). Even proceedings that are core or are integral to the administration of the bankruptcy estate are not before the bankruptcy court unless the district court orders the reference. See *In re Interpictures, Inc.*, 86 Bankr. 24, 28-29 (Bankr. E.D.N.Y. 1988).

Although bankruptcy courts may participate in core and non-core proceedings, their role depends significantly on the nature of the proceeding. Bankruptcy courts may "hear and determine" core proceedings, subject to at least appellate review by the district court. 28 U.S.C. 157(b)(1). In contrast, the bankruptcy court may only submit recommended findings to the district court in non-core proceedings; absent consent of the parties, the district court must review contested non-core matters *de novo* before entering final judgment. 28 U.S.C. 157(c)(1).

The 1984 Act does not define "core" proceedings, but it does describe them as "arising under title 11, or arising in a case under title 11." 28 U.S.C. 157(b)(1). The Act also sets forth a non-exhaustive list of 15 illustrative core proceedings, including such basic matters as "allowance[s] or disallowance[s] of claims against the estate," 28 U.S.C. 157(b)(2)(B), and—of direct relevance to this case—"matters concerning the administration of the estate," 28 U.S.C. 157(b)(2)(A). The statute further provides that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the

basis that its resolution may be affected by State law." 28 U.S.C. 157(b)(3). The balance of the bankruptcy jurisdiction is comprised of non-core proceedings, which the 1984 Act describes as those "otherwise related to a case under title 11," 28 U.S.C. 157(c)(1).

2. Respondent's action to collect a claim based on a post-petition insurance contract covering the estate's assets (unlike a suit to recover a pre-petition claim) falls within the literal wording of 28 U.S.C. 157(b)(2)(A)—"matters concerning the administration of the estate"—because the claim arose out of the administrative duties of the debtor-in-possession. Those duties are worth stating in some detail. When a debtor files for bankruptcy under Chapter 11, see 11 U.S.C. 1101-1146, as respondent did here, all of its assets are transferred to a new legal entity—the estate. See 11 U.S.C. 541(a); *In re Strangis*, 67 Bankr. 243, 245-246 (Bankr. D. Minn. 1986). At that time, the debtor becomes the "debtor-in-possession," responsible, under 11 U.S.C. 1107, for administering the estate. See *In re V. Savino Oil & Heating Co.*, 99 Bankr. 518, 524-525 (Bankr. E.D.N.Y. 1989) (at the moment of filing the debtor "assumes the mantle of a new juridical entity, a debtor-in-possession"). The bankruptcy court may subsequently appoint a trustee to administer the estate, see 11 U.S.C. 1106, but in the absence of a trustee, as in the present case, the debtor-in-possession shall, with limited exceptions, "perform all the functions and duties * * * of a trustee." 11 U.S.C. 1107(a); see Bankr. R. 9001(10); H.R. Rep. No. 595, 95th Cong., 1st Sess. 404 (1977) (Section 1107 "places a debtor in possession in the shoes of a trustee in every way").

The debtor-in-possession, exercising the role of the trustee, can sue and be sued on behalf of the estate, see 11 U.S.C. 323, 1107, may operate the business on behalf of the estate, 11 U.S.C. 1107, 1108, and is "considered an officer of the court subject to the supervision and control of the Bankruptcy Court and the provisions of the Bankruptcy Code," *In re V. Savino Oil & Heating Co.*, 99 Bankr. at 524; see *Mosser* v. *Darrow*, 341 U.S. 267, 271 (1951) ("reorganization trustee is the representative of

the court"); *In re Arnold Print Works, Inc.*, 815 F.2d 165, 170 (1st Cir. 1987); *In re Beck Indus., Inc.*, 725 F.2d 880, 888 (2d Cir. 1984) (Friendly, J.); Act of July 1, 1898, ch. 541, § 1, 30 Stat. 544 (designating a trustee as an "officer").

One of the central roles of the trustee/debtor-in-possession is to preserve the *res* of the estate.[10] In the present case, the proposed bankruptcy reorganization plan mandated that the assets of the estate be insured. See Pet. App. A4; J.A. A156-A157. In fulfillment of that mandate, the respondent, as debtor-in-possession, contracted on behalf of the bankruptcy estate through the insurance brokers with petitioner, The Insurance Company of the State of Pennsylvania, to insure the assets of the estate.

The efforts of a trustee or debtor-in-possession to protect and preserve the *res* of the estate by insuring its assets fit squarely within long-accepted notions of "administration of the estate."[11] Cf. *In re Hood*, 92 Bankr. 648, 651 (Bankr. E.D. Va. 1988) ("The bankruptcy court, of course, has and may exercise extensive jurisdiction over the administration and protection of the property of the estate."), aff'd, 92 Bankr. 656 (E.D. Va. 1988). If insuring the assets qualifies as "administration of the estate," then a dispute arising under an insurance contract to protect the *res*, entered into by the debtor-in-possession under the terms of the bankruptcy reorganization plan, should be considered a "matter concerning the administration of the estate" under 28 U.S.C. 157(b)(2)(A). Cf. *Home Ins. Co.* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746, 748 (7th Cir. 1989) (since a "policy

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[10] *In re Florida Airlines, Inc.*, 110 Bankr. 570, 572 (M.D. Fla. 1990); *In re Nautilus of New Mexico, Inc.*, 83 Bankr. 784, 789 (Bankr. D.N.M. 1988); cf. *United States ex rel. Willoughby* v. *Howard*, 302 U.S. 445, 450-452 (1938) (trustee has a fiduciary duty to care for the estate's funds).

[11] The preservation of the estate is so central to the bankruptcy proceedings that if the trustee/debtor-in-possession fails adequately to perform this task, the Code allows any "entity" to receive compensation for "administrative expenses" incurred for the "preservation of the estate." 11 U.S.C. 503(b)(1)(A).

of insurance is an asset of the estate * * *, a request to determine its validity with respect to the debtor is a 'core proceeding' "); *Aetna Cas. & Sur. Co.* v. *Gamel*, 45 Bankr. 345 (N.D.N.Y. 1984) (question whether the trustee assumed an executory insurance contract is a core matter).

3. If any doubt with respect to the proper classification of this proceeding remains, the legislative history resolves it in favor of designating it "core." As the First Circuit explained:

> [T]he legislative history of the [1984 Act] indicates that Congress intended that "core proceedings" would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95 percent of the proceedings brought before bankruptcy judges would be core proceedings. * * * They used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as "Marathon-type" cases, *see, e.g., id.* [130 Cong. Rec.] at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of "a very limited kind," *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness). Representative Kastenmeier said that "jurisdiction in core bankruptcy proceedings is broader than the summary jurisdiction under pre-1978 law," 130 Cong. Rec. E1108 (daily ed. March 20, 1984), and summary jurisdiction covered post-petition claims.

In re Arnold Print Works, Inc., 815 F.2d at 168.

4. Petitioners argue that this dispute must be considered non-core because state law provides the rule of decision. See Pet. Br. 11, 16. But that theory is belied by 28 U.S.C. 157(b). Many if not most of the core proceedings listed by Congress inevitably require the bankruptcy court to look to state law. For example, subsection (B)—"allowance or disallowance of claims"—necessarily

requires the bankruptcy court to review the validity of state law claims. Subsection (C)—"counterclaims by the estate"—inescapably includes state law counterclaims. And subsection (K)—"determinations of the validity, extent, or priority of liens"—plainly requires the bankruptcy court to adjudicate state law lien issues. The core character of a bankruptcy proceeding is not diminished by the fact that the substantive rights being adjusted are often (indeed, almost always) those created by state law. "It is the nature of the proceeding—its relation to the basic function of the bankruptcy court—not the state or federal basis for the claim, that makes the difference here." *In re Arnold Print Works, Inc.*, 815 F.2d at 169. Congress made this point explicit in the 1984 Act:

> A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

28 U.S.C. 157(b)(3).

Petitioners' contrary conclusion rests on construing the jurisdictional grants relating to core jurisdiction—"arising under title 11, or arising in a case under title 11," 28 U.S.C. 157(b)(1)—to encompass only proceedings that implicate the substantive provisions of the bankruptcy code. Pet. Br. 12-15. Perhaps "arising under title 11" could be given such a limiting construction. See *National City Bank* v. *Coopers & Lybrand*, 802 F.2d 990, 993-994 (8th Cir. 1986) ("arising under" jurisdiction reaches only claims based on a provision of title 11). But cf. *Williams* v. *Austrian*, 331 U.S. 642, 658 (1947) ("arising under" jurisdiction reaches state law disputes involving debtors in federal bankruptcy proceedings); *Schumacher* v. *Beeler*, 293 U.S. 367, 374 (1934) (same). But the statute does not stop there, and "arising in a case under title 11" cannot be read to reach only those matters unique to bankruptcy. That phrase plainly includes proceedings that arise during the course of, and as a result of, the bankruptcy case. The present case falls within those terms.

5. To be sure, the provision placing matters of estate administration within the core bankruptcy jurisdiction cannot fairly be read to include actions on *pre*-petition contracts. Because no petition has been filed in the bankruptcy court, no estate has been called into being. For this reason, actions to collect on pre-petition accounts receivable—which closely resemble the proceeding at issue in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982)—cannot be core proceedings under 28 U.S.C. 157 (b) (2) (A). See *Windsor Communications Group, Inc.* v. *Grant*, 75 Bankr. 713, 721 (E.D. Pa. 1985); *In re Standard Metals Corp.*, 97 Bankr. 593, 595 (Bankr. D. Colo. 1988); 1 *Collier on Bankruptcy, supra*, ¶ 3.01 [2] [b] [iv], at 3-50.

Petitioners insist that there is no *constitutional* force to the distinction between pre- and post-petition contracts, but that contention presupposes that Article III requires all state law claims to be tried before an Article III judge. Pet. Br. 18-20. The Article III question is addressed in Point III.C., *infra*. For purposes of defining the core jurisdiction of the bankruptcy court under the 1984 Act, it suffices to note that 28 U.S.C. 157 (b) (2) (A) does draw that distinction by its reference to the "estate." Moreover, that distinction dates back at least to the 1898 bankruptcy law. See Points III.A and III.C.1, *infra*. It is therefore plausible to argue that *any* dispute that arises concerning any contract entered into post-petition by the trustee or debtor-in-possession concerns the administration of the estate. See 1 *Collier on Bankruptcy, supra*, ¶ 3.01 [2] [b] [iv], at 3-50; see also Pet. App. A12 (core jurisdiction extends to post-petition contracts under 28 U.S.C. 157 (b) (2) (A)); *In re Arnold Print Works, Inc.*, 815 F.2d at 168 ("[T]he vast majority of courts that have considered the status of similar post-petition claims have held that they were core proceedings.").[12]

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[12] The "post-petition" cases petitioner cites in support of its position that this dispute is non-core, see Pet. Br. 23-24, concern post-petition *disputes*, not post-petition *contracts*. We agree that post-petition disputes arising out of pre-petition contracts are not

But such a broad argument is unnecessary here. As the court of appeals recognized, Pet. App. A10, Congress plainly intended to include matters that are "at the heart of the administration of the bankruptcy estate" as core matters, and the present case comfortably qualifies as such a matter. Cf. *In re Standard Metals Corp.*, 97 Bankr. at 595. The instant dispute involves a contract entered into by the estate and an insurer during the pendency of the bankruptcy case. The bankruptcy reorganization plan mandated that the debtor-in-possession enter into such a contract on behalf of the estate. The fire creating the damage to the insured assets occurred before the confirmation of the bankruptcy plan. Everything regarding this dispute arose as a result of, and as part of, the bankruptcy case. Because this proceeding arose out of the bankruptcy case and "is inextricably intertwined with the administration of the case," J.A. A112, it is a core matter under 28 U.S.C. 157(b)(2)(A).[13]

III. ADJUDICATING POST-PETITION CONTRACTUAL DISPUTES INVOLVING ESTATE ADMINISTRATION IN THE BANKRUPTCY COURT IS CONSISTENT WITH ARTICLE III AND THE SEVENTH AMENDMENT

Before reaching the question whether a jury trial in a core proceeding in bankruptcy court violates Article III or the Seventh Amendment, the Court should first determine whether petitioners are entitled to a jury trial

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core proceedings under 28 U.S.C. 157(b)(2)(A). For the reasons stated in text, however, disputes over post-petition contracts that involve estate administration are core proceedings under the literal language of Section 157(b)(2)(A).

[13] If this Court disagrees and holds that the case is a non-core proceeding, then that determination should end the inquiry on the merits. As we explained in Point I, *supra*, a finding that this case is non-core is tantamount to a determination that it is merely "related to" a case arising under title 11, and is therefore subject to the mandatory, non-reviewable abstention ordered by the district court pursuant to 28 U.S.C. 1334(c)(2).

and whether the bankruptcy court is statutorily authorized to conduct one.[14]

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[14] These issues are properly before the Court. Alhtough respondent did not cross-petition on petitioners' right to a jury trial, that issue was pressed by the parties in the court of appeals, see Resp. C.A. Br. 30-35, and passed on by the Second Circuit, see Pet. App. A17-A18. Moreover, acceptance of this argument would not enlarge or diminish the court of appeals' judgment. Because petitioners contend that a non-Article III tribunal such as a bankruptcy court cannot conduct a constitutional jury trial, Pet. Br. 43, they are no worse off having a jury trial before a decision-maker unable to conduct one (as they do under the court of appeals' judgment) than they are having no jury trial at all. The issue of petitioners' entitlement to a jury trial is therefore properly before this Court. See, *e.g.*, *Thigpen* v. *Roberts*, 468 U.S. 27, 32-33 (1984); *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842 n.7 (1984); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Dayton Bd. of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). Compare *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2788-2789 (1989) (declining to review question neither pressed nor passed on by court below).

The issue of statutory authority to conduct jury trials in bankruptcy court is fairly comprised within the second question presented. Determination of what the statute requires is a necessary prerequisite to determining whether the Constitution has been transgressed. Moreover, the conflict between the court of appeals' decision and the Eighth Circuit's decision in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990), is limited to the statutory authority to conduct jury trials in bankruptcy court. Petitioner reprinted the Eighth Circuit's opinion in an appendix, Pet. App. A38-A52, and sought review of that conflict in this Court, see Pet. Reply Br. 3.

In any event, the United States as intervenor should not be bound by the parties' framing of the issues in this case. Had the Attorney General been notified while this case was pending in the court of appeals, as required by Fed. R. App. P. 44 and 28 U.S.C. 2403(a), the government could have intervened and advanced the preceding arguments in defense of the constitutionality of the bankruptcy statute. The point of intervention is to "prevent constitutional or legal issues of potential significance from being decided with only limited input from private litigants, who may care little or nothing about the principles at stake." *Ruotolo* v. *Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978).

A. Petitioners Have No Right To A Jury Trial

If a case involves "public rights," or if a party submits to the equitable jurisdiction of the bankruptcy court, then the proceedings carry no jury trial right. See *Granfinanciera, S.A.* v. *Norberg*, 109 S. Ct. 2782, 2790 n.4, 2796-2797 (1989) (no jury trial right if the case involves public rights); *id.* at 2799-2800 & n.14 (discussing the holding in *Katchen* v. *Landy*, 382 U.S. 323 (1966), that submission to the bankruptcy court's equitable summary jurisdiction waives a party's Seventh Amendment right to a jury trial). Under the 1984 Act, most core proceedings are not triable to a jury as of right because they are public rights proceedings involving traditional bankruptcy matters that are closely integrated to the federal bankruptcy scheme. Many of the remaining core matters, such as adjudication of counterclaims, 28 U.S.C. 157(b)(2)(C), likewise carry no jury trial right because they reflect the long standing principle that a party filing a claim with the estate submits itself to the equitable summary jurisdiction of the bankruptcy court. See *Katchen* v. *Landy*, 382 U.S. 323 (1966); 130 Cong. Rec. 6045-6046 (1984) (prepared statement of Rep. Kastenmeier).

1. *Petitioner Has Consented to The Bankruptcy Court's Equitable Jurisdiction*

An insurance contract dispute would ordinarily be considered a legal dispute triable to a jury as of right under the Seventh Amendment. See Pet. App. A17-A18. By knowingly contracting with a debtor-in-possession to insure the assets of a bankruptcy estate, however, petitioners voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court. Parties who knowingly contract with a trustee or debtor-in-possession "know that they are dealing with an agent responsible to a bankruptcy court." *In re Arnold Print Works, Inc.*, 815 F.2d at 170. "[T]hat the bankruptcy court would resolve sub-

sequent disputes should therefore come as no surprise." *Ibid.*

At least as far back as the 1898 Bankruptcy Act, parties who contracted with a trustee or debtor-in-possession on matters involving the administration of the estate were considered to have contracted with an officer of the court and to have subjected themselves, for purposes of the contract, to the summary jurisdiction of the adjunct bankruptcy court. See Point III.C.1, *supra; In re Arnold Print Works, Inc.*, 815 F.2d at 169-170; *In re California Eastern Airways, Inc.*, 95 F. Supp. 348, 351 (D. Del. 1951); *In re Alan Wood Steel Co.*, 1 Bankr. 167, 169 (Bankr. E.D. Pa. 1979). As the First Circuit held in 1917, by contracting with an officer of a bankruptcy estate, a company subjects itself to the summary jurisdiction of the bankruptcy court:

> * * * [T]he agreement was unmistakably made with officers of that court appointed by it in a pending bankruptcy case, and [the contract] can only be regarded as made and approved by the court for the purposes of that case. An agreement so made is to be regarded as an agreement with the court * * *. And while it remained in force, the court with whom it was so made could order it complied with * * *. *By contracting with the receivers, the company became a quasi party, instead of a stranger to the record, and subjected itself, for the purposes of the contract, to the orders of the [bankruptcy] court.*

In re Hollingsworth & Whitney Co., 242 F. 753, 756 (emphasis added; citations omitted). See also *Governor Clinton Co.* v. *Knott*, 120 F.2d 149, 153 (2d Cir. 1941) ("enforcement of contracts made with the court's officers * * * is a necessary step in the proper administration of the estate, and well within the powers of a bankruptcy court acting essentially as a court of equity"); *Jackson* v. *Moore*, 348 F.2d 437, 440 (5th Cir. 1965) ("The [Bankruptcy] Court had summary jurisdiction to dispose of any controversies affecting the bankrupt estate arising out of the terms of the contract with the Trustee.").

Petitioners were not misled into thinking that they were insuring an ordinary business enterprise. Petitioners knew that respondent was executing the insurance contract not in its individual capacity, but rather in its capacity as representative of the bankruptcy estate and as an official of the bankruptcy court—*viz.*, as debtor-in-possession. Indeed, the correspondence and checks petitioners received from respondent bore the unmistakable legend "Ben Cooper, Inc., D.I.P." See note 1, *supra*. Moreover, petitioners knew the subject matter of the policy was not property of the debtor, but property of the estate. See Pet. App A12. By entering into this contract with the estate, petitioners consented to the bankruptcy court's adjudication of claims arising out of the policy without a jury trial. Cf. *Katchen* v. *Landy*, 382 U.S. 323 (1966).

In *Katchen* v. *Landy*, this Court rejected a defendant's jury trial demand because the defendant had filed a proof of claim against the estate. 382 U.S. at 336-337. As this Court recently explained, "*Katchen* makes clear * * * [that] by submitting a claim against the bankruptcy estate, creditors subject themselves to the court's equitable power to disallow those claims, even though the debtor's opposing counterclaims are legal in nature and the Seventh Amendment would have entitled creditors to a jury trial had they not tendered claims against the estate." *Granfinanciera*, 109 S. Ct. at 2799 n.14; see *Alexander* v. *Hillman*, 296 U.S. 222, 241-252 (1935) (a party who files a claim subjects itself "to all the consequences that attach to an appearance"). Thus, a party that submits itself "to the equitable power of the bankruptcy court" allows otherwise legal claims to be adjudicated by the bankruptcy court without a jury trial. See *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1389-1390 (2d Cir. 1990); *In re Hughes-Bechtol, Inc.*, 107 Bankr. 552, 564-566 (Bankr. S.D. Ohio 1989); *In re Friedberg*, 106 Bankr. 50, 55-56 (Bankr. S.D.N.Y. 1989); cf. *CFTC* v. *Schor*, 478 U.S. 833, 852 (1986) (election of

non-Article III forum waives right to have state-law counterclaim adjudicated in Article III court).

Similarly, petitioners—by knowingly contracting with the debtor-in-possession as a representative of the bankruptcy estate to insure the assets of the estate—voluntarily subjected themselves to the equitable jurisdiction of the bankruptcy court. Therefore, the dispute arising under the insurance contract with the estate should be treated as an equitable proceeding that may be tried without a jury in bankruptcy court.

2. *This Dispute Involves "Public Rights" Which Are Not Triable to A Jury As Of Right*

This Court has "long recognized that Congress is not barred from acting pursuant to its powers under Article I to vest decisionmaking authority in tribunals that lack the attributes of Article III courts." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 583 (1985). When federal statutory rights are involved, initial administrative adjudication is commonly and properly used to draw upon the expertise of the agency and to relieve the courts of the "serious burden" of full adjudication. *Marathon*, 458 U.S. at 80, 83 (plurality opinion); *Crowell* v. *Benson*, 285 U.S. 22, 54, 57 (1932); *United States* v. *Kras*, 409 U.S. 434, 447 (1973). Accordingly, this Court has held that if a statutory right is either closely intertwined with a federal program that Congress has power to enact, or belongs to or is asserted against the federal government, then Congress may allow a non-Article III entity to adjudicate such "public rights" with limited review by an Article III court. See *Granfinanciera*, 109 S. Ct. at 2797; *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 594. Such public rights need not be tried to a jury even if they are analogous to legal claims that would have been tried to a jury in an action at law. See *Granfinanciera*, 109 S. Ct. at 2790 n.4, 2796-2797; *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450 (1977).

The exact contours of what qualifies as a public right remain unclear, but guidance can be found in *Thomas* v. *Union Carbide Agricultural Products Co.*, *supra*. In *Thomas*, this Court held that Congress could, consistent with Article III, direct that disputes arising among participants in the pesticide registration scheme established by FIFRA (the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*) be resolved by binding arbitration with only limited review available in an Article III court. The Court observed that the FIFRA scheme bore many of the characteristics of a "public" right because the registration system is an integral part of a program safeguarding the public health. 473 U.S. at 589. The Court concluded: "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for * * * limited involvement by the Article III judiciary." *Id.* at 593-594.

This Court has expressly held that public rights cases need not directly involve the United States as a party. See *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 589-594. Moreover, in *Marathon*, the plurality presumed that in a bankruptcy case disputes concerning the adjustment of the debtor-creditor relationship at the core of the bankruptcy power are public rights. *Marathon*, 458 U.S. at 71 (plurality opinion). Recently, in *Granfinanciera*, the Court reaffirmed *Thomas*'s holding that public rights disputes are not restricted to suits between citizens and the federal government, but include seemingly private disputes if closely integrated into a public regulatory scheme. *Granfinanciera*, 109 S. Ct. at 2797.[16]

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[16] While this Court has expressly rejected the proposition that Congress's power to assign matters to a non-Article III forum is limited to matters where the federal government is a party to the dispute, see *Thomas*, 473 U.S. at 585-586, 594, whether the federal government is a party to the proceedings nonetheless remains a

In determining whether the present dispute involves public rights, the critical focus should be on whether the dispute "is so closely integrated into a public regulatory scheme as to be a matter appropriate for * * * limited involvement by the Article III judiciary." *Thomas*, 473 U.S. at 594. As a first step there must be a "public regulatory scheme."

The federal bankruptcy system is just such a program. It was constituted by Congress through exercise of its Article I power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, Cl. 4; see *In re Walters*, 868 F.2d 665, 670 (4th Cir. 1989). This Court has long recognized the broad power vested in Congress by the Constitution to establish a federal bankruptcy scheme. See *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 191-196 (1819) (Marshall, C.J.). Over time, Congress has expanded its exercise of this constitutional authority in order to address manifest public problems. Notably, the first bankruptcy act, and every expansion thereafter before the most recent revisions, followed a major or minor depression. See *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 581-582 n.11 (1935); C. Warren, *Bankruptcy in United States History* (1935). These extensions of the federal bankruptcy scheme have been deemed "funda-

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relevant factor. The federal government's participation as a party is strong evidence that the proceedings involve public rights which may be adjudicated in the first instance by a non-Article III entity. Thus, it is notable that the executive branch is technically a party to every bankruptcy case via the participation of the United States Trustee. The United States Trustees are officers of the executive branch who "represent the public interest" in every bankruptcy case. *In re Revco, D.S., Inc.*, 898 F.2d 498, 500 (6th Cir. 1990); see H.R. Rep. No. 595, 95th Cong., 1st Sess. 109 (1977); Pearson and FitzSimon, *The Role of the United States Trustee*, (pt. 2) 1990-No. 7 Norton Bankruptcy Law Adviser 1 (July 1990). Indeed, the United States Trustee's interests and involvement in bankruptcy matters allow him the right to appeal, even though he has no monetary stake in the proceedings. *In re Revco*, 898 F.2d at 500.

mental and radically progressive [in] nature," and "far reaching." *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, 671 (1935). At the same time, these expansions merely constitute "extensions into a field [of constitutional authority] whose boundaries may not yet be fully revealed." *Ibid.*

The current federal bankruptcy scheme provides a unitary federal forum for administration and dispute resolution. This forum facilitates the orderly discharge of indebtedness, equitable distribution of the estate, and rehabilitation of the debtor. Absent a comprehensive federal bankruptcy scheme, ordinary economic forces would frustrate orderly distribution to creditors and preclude rehabilitation.[16] In short, the federal bankruptcy scheme confers a public benefit and implicates the public interest in a way that ordinary suits between private litigants do not. See *Page* v. *Edmunds*, 187 U.S. 596, 605 (1903); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 192 (1902). Thus, the federal bankruptcy system should be considered a "public regulatory scheme" under *Thomas*.

The second inquiry under *Thomas* is whether the specific proceeding at issue is "so closely integrated" to the federal scheme that it should be regarded as involving public rights. The fact that a dispute involves state

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[16] Traditional rights and remedies are inadequate in the context of a bankruptcy because an insolvent by definition has insufficient assets to cover his liabilities, thus precipitating an undesirable rush to judgment and execution that rewards the quickest and most aggressive creditors, perhaps by payment in full, while leaving those less quick or more tolerant to recover nothing. Rehabilitation is impossible where creditors are panicked into desperate efforts to exercise their traditional remedies of execution and foreclosure. Litigation is haphazard and spread out over multiple jurisdictions. The federal bankruptcy scheme protects the debtor from the exercise of traditional creditor remedies by giving a breathing space to enable either a rational liquidation or rehabilitation benefitting both the debtor and creditors and, in the case of a business enterprise, the debtor's employees, customers, suppliers, and owners. See *In re Elcona Homes Corp.*, 863 F.2d 483, 484 (7th Cir. 1988); T. Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986).

law does not mean that it is not integrally related to the federal scheme. In both *Thomas* and *CFTC* v. *Schor*, 478 U.S. at 850-856, this Court found that although the proceedings at issue involved state law they still should be considered integrally related to a federal scheme. In the bankruptcy context, this Court has presumed that disputes concerning the adjustment of the debtor-creditor relationship (that is, the process of allowance and disallowance of claims), although involving state law, should nonetheless be deemed matters concerning public rights. See *Marathon*, 458 U.S. at 71 (plurality opinion); see also 130 Cong. Rec. 6047 (1984) (prepared statement of Rep. Kastenmeier) ("State law rights arising in core bankruptcy proceedings are functionally equivalent to congressionally created rights, because Congress has the power to modify State law rights in bankruptcy proceedings. * * * Indeed the very purpose of bankruptcy is to modify the rights of debtors and creditors.").

But public rights proceedings in bankrupcy should not be limited to the process of allowing and disallowing claims. Other proceedings are also integral to the operation of the federal bankruptcy scheme. For example, disputes regarding the estate's relationship with professional fiduciaries, who are employed to maintain, preserve, and protect the estate, are at the heart of the operation of the federal scheme, even though such disputes often involve state law. Surely, a fee or malpractice dispute between the estate and the trustee or other professionals hired by the estate (*e.g.*, attorneys and accountants) must be subject to adjudication by the bankruptcy court as a matter integrally related to the administration of the estate. See *Woods* v. *City Nat'l Bank & Trust Co.*, 312 U.S. 262, 267-268 (1941) ("Under Ch. X of the Chandler Act the bankruptcy court [which included the referee] has plenary power to review all fees and expenses in connection with the reorganization.").

As we explained in Point II, *supra*, this core proceeding involves a post-petition contract to insure the *res* of

the estate and must likewise be considered integrally related to the administration of the estate. See *Governor Clinton Co.* v. *Knott*, 120 F.2d at 153 ("enforcement of contracts made with the court's officers * * * is a necessary step in the proper administration of the estate, and well within the powers of a bankruptcy court acting essentially as a court of equity"). The bankruptcy scheme creates the legal entity the "estate," 11 U.S.C. 541(a), and requires the bankruptcy trustee (or, in the present case, the debtor-in-possession) to preserve and protect the estate. As explained above, see p. 20, *supra*, that task is central to the administration of the estate. In the present case, in performance of this essential role, the debtor-in-possession contracted, on behalf of the estate, to insure the assets of the estate. Because of the importance of preserving the *res* of the estate, the bankruptcy reorganization plan mandated that the assets of the estate be insured. See Pet. App. A4.

Under these circumstances, the post-petition insurance of the assets of the estate should be considered integral to the administration of this estate and thus to the federal bankruptcy scheme. Hence, any dispute regarding an insurance policy entered into by an officer of the court to protect the estate is itself a matter involving public rights.[17]

B. *The Bankruptcy Statute Does Not Authorize Jury Trials in Bankruptcy Court*

If the Court disagrees with the foregoing and concludes that petitioners are entitled to a jury trial, the Court must then determine whether the 1984 Act authorizes jury trials in bankruptcy court.

The 1984 Act is silent on the question. Cf. *Granfinanciera*, 109 S. Ct. at 2790-2791 n.3. The Second Circuit

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[17] The fraudulent conveyance action at issue in *Granfinanciera* is quite different. Prior to the 1984 Act, "[s]uits to recover preferences constitute[d] no part of the proceedings in bankruptcy." 109 S. Ct. at 2794 (quoting *Schoenthal* v. *Irving Trust Co.*, 287 U.S. 92, 94-95 (1932)); accord *id.* at 2798.

inferred the existence of such statutory authority based on Congress's general intent to allow bankruptcy courts to enter final judgments in all core proceedings. Pet. App. A19. The Eighth and Tenth Circuits have recently rejected that analysis. See *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990); *In re Kaiser Steel Corp.*, No. 90-1013 (10th Cir. Aug. 10, 1990). They held instead that Congress's silence, the absence of any tradition of jury trials in bankruptcy court, and the "serious constitutional problems posed" by an interpretation that would imply such authority, all counseled against such an interpretation. *In re United Missouri Bank*, 901 F.2d at 1455-1457; *In re Kaiser Steel Corp.*, No. 90-1031 (10th Cir. Aug. 10, 1990), slip op. 20-23. We submit that the Eighth and Tenth Circuits reached the correct result.

1. The 1984 Act does not by its terms authorize or forbid jury trials in bankruptcy court, as a brief survey of the statutory text and legislative history reveals. The only language in the Act addressing "the right to trial by jury" appears in 28 U.S.C. 1411:

> (a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.
>
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

This Court has characterized Section 1411 as "notoriously ambiguous" and the legislative history accompanying it as "confused." *Granfinanciera*, 109 S. Ct. at 2789 n.2. What little legislative history exists suggests that Congress was concerned that tort victims' right to a jury trial before the district court in personal injury and wrongful death cases not be lost simply because defendants filed for bankruptcy. See 130 Cong. Rec. 20,228 (1984) (remarks of Rep. Kastenmeier) ("in this narrow range of [personal injury and tort] cases the parties do not lose any right to a jury trial"); 130 Cong. Rec.

20,081 (1984) (remarks of Sen. Thurmond) (Section 1411 provides "that this chapter of title 28 and title 11 do not affect a right to trial by jury * * * with regard to a personal injury or wrongful death tort claim"). This reading of Section 1411 is consistent with 28 U.S.C. 157, which designates personal injury and wrongful death claims as non-core proceedings, 28 U.S.C. 157(b)(2)(B), which are to be tried by a jury before a district court, 28 U.S.C. 157(b)(5). See 130 Cong. Rec. 20,226 (1984) (remarks of Rep. Fish); *id.* at 20,228 (remarks of Rep. Hall).

2. The provision for jury trials in tort cases in the district court does not answer the question whether Congress intended jury trials in bankruptcy court. On the one hand, one might argue that Congress intended all jury trials except for those in tort cases to occur in bankruptcy court. On the other hand, one might argue that Section 1411(b) manifests the Legislature's intention that only the district court, not the bankruptcy court, preside over jury trials. The question in this case, then, is which way the statutory silence cuts. For three reasons, we believe that Congress's silence counsels against authorizing jury trials in bankruptcy court.

First, the 1984 Act reconstituted bankruptcy judges as adjuncts on the model of the United States Magistrates. See, *e.g.*, 130 Cong. Rec. 20,227 (1984) (statement of Rep. Kastenmeier) ("[T]he bill we passed provided that bankruptcy judges shall serve as adjuncts of the Federal district court. * * * These two features were the heart of the House-passed bill. Both of these features have been retained in conference."). Congress was well aware that this Court had approvingly described the constitutional status of magistrates as that of "adjuncts" to the district courts. *Marathon*, 458 U.S. at 77, 79 (plurality opinion); *United States* v. *Raddatz*, 447 U.S. 667, 682, 683 (1980). Magistrates are expressly authorized by statute to conduct jury trials in civil cases when the parties consent. 28 U.S.C. 636(c)(1); see also 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401(a)-(b) (authorizing magistrates to conduct certain criminal misdemeanor trials, including jury trials). By contrast,

bankruptcy judges lack comparable statutory authority. Given the similar adjunct status shared by magistrates and bankruptcy judges, and the use of the magistrate system as a model for the bankruptcy reference system established by the 1984 Act, it is highly unlikely that Congress would have explicitly granted jury trial authority to magistrates and have made no such explicit grant to bankruptcy judges if it intended them both to conduct jury trials. Cf. *Gomez* v. *United States*, 109 S. Ct. 2237, 2242-2246 (1989) (strictly construing "other duties" which magistrates may be assigned).

Second, the Bankruptcy Reform Act of 1978 vested in the bankruptcy courts jurisdiction over all civil actions arising under title 11 or arising in or related to such cases. 28 U.S.C. 1471(b)-(c) (repealed 1984). The broad grant of jurisdiction, combined with 28 U.S.C. 1480, which preserved the parties' rights to jury trials, made unmistakable Congress's intention to hold jury trials in the bankruptcy court. See *Marathon*, 458 U.S. at 55 ("Congress has allowed bankruptcy judges the power to hold jury trials."); H.R. Rep. No. 595, 95th Cong., 1st Sess. 12 (1977) ("Bankruptcy courts will be required to hold jury trials to adjudicate what are under present law called 'plenary suits.'").

When it enacted the 1984 Act, however, Congress deleted both Sections of the 1978 Act that had been construed to authorize jury trials in bankruptcy court. Thus, while 28 U.S.C. 1411(b)'s predecessor under the 1978 Act (former 28 U.S.C. 1480(b)) allowed the "bankruptcy court" to hold jury trials, the current provision permits only "[t]he district court," to order issues arising under 11 U.S.C. 303 (regarding involuntary petitions) to be tried without a jury. The change from "bankruptcy court" to "district court" in the 1984 Act evidences Congress's intent to have the district court, rather than the bankruptcy court, preside over jury trials.[18]

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[18] Further evidence that Congress did not intend bankruptcy courts to conduct jury trials is provided by Part (d)(1)(D) of the Emergency Rule adopted by the Judicial Conference. That

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Third, Congress's broader purpose in the 1984 Act was to curtail the independent authority of bankruptcy judges, among which was the power to preside over jury trials. In passing the 1984 Act, Congress's main objective was to create a bankruptcy court scheme which would avoid the constitutional pitfalls exposed by *Marathon*. See *In re Wood*, 825 F.2d at 95. The *Marathon* Court found that the 1978 Act vested the essential attributes of judicial power in the bankruptcy court, specifically relying on the fact that under the 1978 Act bankruptcy courts could "exercise all ordinary power of district courts, *including the power to preside over jury trials.*" 458 U.S. at 84-85 (emphasis added) (plurality opinion).

In reaction to *Marathon*, Congress carefully placed the "judicial power" over bankruptcy matters in the district court, thus ensuring that the "essential attributes" of judicial power were retained in an Article III court. Compare S. Rep. No. 55, 98th Cong., 1st Sess. 36-37 (1983), with *Marathon*, 458 U.S. at 77-81 (plurality opinion). That is to say, Congress vested all bankruptcy jurisdiction in the district court, not the bankruptcy court. 28 U.S.C. 1334. Only if the district court decides to refer bankruptcy matters to the bankruptcy court does the bankruptcy court have any power. 28 U.S.C. 157(a). And, even if the district court refers a case, the bankruptcy court may enter final judgment only on core matters, subject to district court appellate review. 28 U.S.C. 157(b). Even then, the district court may by rule or order restrict the bankruptcy court's statutory authority. 28 U.S.C. 151. At all times, the district court re-

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provision clearly stated that "bankruptcy judges may not * * * conduct jury trials." The significance of the Judicial Conference's provision is that the 1984 Act is "essentially a legislative enactment of the emergency bankruptcy rule, the model rule that has been in effect, under which the bankruptcy courts have been operating. * * * The only changes contemplated by our amendment are to add the endorsement of the Congress to the emergency rule * * *." 130 Cong. Rec. 6242 (1984) (statement of Rep. Kindness).

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tains power to withdraw any or all proceedings from the bankruptcy court. 28 U.S.C. 157(d).

What appears from the 1984 statute is that Congress carefully avoided cloaking the bankruptcy court with too much judicial authority. Where Congress did provide the bankruptcy court with judicial authority, it did so in a limited sense and it did so expressly. In view of this statutory scheme, and Congress's clear intent to avoid a bankruptcy court that would amount to "an unwarranted encroachment" into the province of the Article III judiciary, it is unreasonable to infer from statutory silence that Congress granted bankruptcy judges the power to preside over jury trials. See *In re Kaiser Steel Corp.*, slip op. 21-23; *In re United Missouri Bank*, 901 F.2d at 1456. That inference is simply inconsistent with Congress's express goal of limiting the juridical authority of bankruptcy judges.[19]

C. A Bankruptcy Court May Conduct A Jury Trial Consistent With Article III And The Seventh Amendment

Although the 1984 Act does not authorize bankruptcy judges to preside over jury trials, such statutory authority would be constitutional.

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[19] The arguments in text indicate that Congress did not confer statutory authority to conduct jury trials on bankruptcy courts, whether the proceeding is core or non-core. If the proceeding is non-core, an additional obstacle stands in the way of construing the 1984 Act to authorize jury trials in bankruptcy court. The review provision governing non-core proceedings provides that the district court must review "de novo those matters to which any party has timely and specifically objected." 28 U.S.C. 157(c)(1). Reading that Section in light of the Seventh Amendment's Re-examination Clause—as one would have to do if bankruptcy judges could preside over jury trials in non-core proceedings—the word "matters" would have to mean different things in bench and jury trials. The awkwardness of that construction is evidence that jury trials in non-core proceedings cannot take place in bankruptcy court.

1. *Holding Jury Trials In Bankruptcy Court Does Not Violate Article III*

The court of appeals below correctly observed that "[*i*]*f* bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A21-A22 (emphasis added). The reason is clear. If bankruptcy judges can conduct bench trials consistent with Article III, then the presence of a jury weakens rather than strengthens the Article III challenge. The principal Article III concern is that the political branches might inappropriately influence adjudicators who lack life tenure and salary protection. See *Marathon*, 458 U.S. at 60 (plurality opinion). Jurors, unlike judges, are not dependent on the government for their offices and therefore are not susceptible to pressure from that source. It follows that if bankruptcy courts can adjudicate claims in bench trials consistent with Article III, that Article does not bar them from holding jury trials.[20]

We therefore return to the issue this Court faced in *Marathon*—whether petitioners are entitled to litigate their claims in an Article III court. *Marathon* held, in brief, that Congress could not constitutionally invest a non-Article III officer with power to hear a pre-petition state contract action only peripherally related to the bankruptcy case. 458 U.S. at 84 (plurality opinion); *id.* at 90 (Rehnquist and O'Connor, JJ., concurring in the judgment).[21] Four crucial differences dictate a different outcome here.

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[20] Cf. *Fields* v. *Washington Metro. Area Transit Auth.*, 743 F.2d 890, 891, 894 (D.C. Cir. 1984) (upholding against Article III challenge jury verdict in trial presided over by magistrate); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1038, 1045 (7th Cir. 1984) (same); *Collins* v. *Foreman*, 729 F.2d 108, 110, 114-120 (2d Cir. 1984) (same); *Goldstein* v. *Kelleher*, 728 F.2d 32, 34 (1st Cir. 1984) (same); *Williams* v. *Mussomelli*, 722 F.2d 1130, 1132 (3d Cir. 1983) (same).

[21] Because *Marathon* had no majority opinion, the only "clear holding" is the limited view expressed in the concurring opinion.

[Continued]

First, the 1984 Act constituting the bankruptcy courts differs materially from the 1978 legislation challenged in *Marathon*. The *Marathon* plurality compared unfavorably the bankruptcy system established by the 1978 Act with the 1898 Act which preceded it. See 458 U.S. at 79 n.31. The 1984 Act removes the objectionable features of the 1978 Act and adopts many aspects of the old referee system of which the plurality spoke approvingly. The current legislation should therefore pass constitutional muster even under the *Marathon* plurality's exacting scrutiny.

Bankruptcy referees under the 1898 Act were adjuncts of the district court. *Marathon*, 458 U.S. at 79-80 n.31 (plurality opinion) ("bankruptcy referees were appointed and removable only by the district court * * * [a]nd the district court retained control over the reference by his power to withdraw the case from the referee"). Under the referee system, the Article III requirement of an independent judiciary was ensured, because "even at the trial stage, the parties had access to an independent judicial officer." 458 U.S. at 79-80 n.31.

The plurality's favorable description of the old referee system supports the constitutionality of the 1984 Act. Whereas the executive branch appointed bankruptcy judges who exercised jurisdiction over bankruptcy matters in the 1978 Act, Article III judges now appoint and remove bankruptcy judges. 28 U.S.C. 152. And whereas the bankruptcy courts themselves exercised the bankruptcy jurisdiction and were virtually independent of the United States District Courts under the 1978 Act, 458 U.S. at 79-80 n.31, the district courts alone exercise jurisdiction over bankruptcy matters under the 1984 Act, 28 U.S.C. 151, 157, 1334. By law, bankruptcy judges are today merely "unit[s]" of the district court. 28 U.S.C. 151. The district courts exercising the bankruptcy jurisdiction now have power to refer some, all, or no bank-

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[21] [Continued]

White Motor Corp. v. *Citibank, N.A.*, 704 F.2d 254, 260 (6th Cir. 1983); see also *Marathon*, 458 U.S. at 92 (Burger, C.J., dissenting); *id.* at 94 n.2 (White, J., dissenting).

ruptcy proceedings to the bankruptcy court;[22] to withdraw a bankruptcy case at any time in their discretion, 28 U.S.C. 157(a) and (d);[23] and to exercise exclusive jurisdiction over withdrawn cases to the exclusion of the bankruptcy courts.[24] As the court of appeals observed in *In re Hipp, Inc.*, 895 F.2d 1503 (5th Cir. 1990): "[W]e are unsure even that today's bankruptcy courts are 'courts' in a generic sense not defined by Article III." *Id.* at 1514. "[T]oday's bankruptcy courts are arguably at least as much like magistrates or even administrative agencies as they are like other non-Article III courts," *id.* at 1515.

In sum, the 1984 Act largely returned the bankruptcy judges to their previous role as adjuncts of the district courts. *In re Bertoli*, 812 F.2d 136, 139 (3d Cir. 1987). To paraphrase the *Marathon* plurality, bankruptcy litigants under the 1984 Act have access to an independent judicial officer even at the trial stage. Cf. *Marathon*, 458 U.S. at 79 n.31 (plurality opinion). Given the substantial degree of control and supervision of the district courts, statutory authority allowing bankruptcy judges to preside over jury trials in a very limited number of core matters poses no threat to the Article III judiciary. See *In re Mankin*, 823 F.2d 1296, 1308-1310 (9th Cir. 1987); see also *Olympia Hotels Corp.* v. *Johnson Wax*

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[22] See *In re Interpictures, Inc.*, 86 Bankr. at 28-29 (even "core" matters do not have to be referred to the bankruptcy court).

[23] See, *e.g.*, *Ameritel Corp.* v. *Isoetec Communications, Inc.*, 109 Bankr. 965, 967-68 (D. Or. 1990) (withdrawing a core matter); *In re A.H. Robins Co.*, 88 Bankr. 742, 743 (E.D. Va. 1988) (withdrawing entire Chapter 11 case on day petition filed), aff'd, 880 F.2d 694 (4th Cir. 1989); *In re American Community Servs., Inc.*, 86 Bankr. 681 (D. Utah 1988) (withdrawing adversary proceeding a year and a half after complaint filed); *Danning* v. *Lummis (In re Tom Carter Enterprises, Inc.)*, 44 Bankr. 605, 609 (C.D. Cal. 1984) (excepting only *final* decisions of the bankruptcy judge from withdrawal power); see also 1 *Collier on Bankruptcy*, *supra*, ¶ 3.0-[2][e], at 3-63.

[24] See *UNR Indus., Inc.* v. *Continental Ins. Co.*, 101 Bankr. 524, 526 (N.D. Ill. 1989) (bankruptcy court has no power to grant or withhold approval of a settlement of a withdrawn adversary claim).

Dev. Corp., 908 F.2d 1363, 1368 (7th Cir. 1990) (suggesting that a bankruptcy judge could preside over trials on core matters). The dictates of Article III are accordingly satisfied even under the view of the *Marathon* plurality.

Second, petitioner's *post*-petition dispute in this case stands on a different constitutional footing from the *pre*-petition contract dispute in *Marathon*. As the First Circuit stated, post-petition contracts fell within the summary jurisdiction of the bankruptcy court under the 1898 Act:

> If one examines the jurisdictional history of post-petition claims of the sort in issue here, one finds that they are not "traditional contract actions"; nor are they matters that "historically" have been decided only in the equivalent of Article III courts. To the contrary, bankruptcy courts have adjudicated claims like this one at least since the enactment of the Bankruptcy Act of 1898. Indeed, they have done so in exercise of "summary jurisdiction"—a jurisdiction permitting the bankruptcy court to sit as a court in equity, deciding without a jury matters that a jury might have decided had a party pressed the same claim in a state court.

In re Arnold Print Works, Inc., 815 F.2d at 169. The First Circuit observed that post-petition contracts with an officer of the bankruptcy court (either the trustee or, as here, the debtor-in-possession) were "treated as contracts with the court itself" by which act the contracting party "*subjects himself for the purposes of the contract to the summary jurisdiction of the court.*" 815 F.2d at 170 (emphasis in original; citation omitted). The First Circuit concluded that "the history of bankruptcy court jurisdiction means that a post-petition contract made with a debtor-in-possession cannot be called a 'traditional' state contract action." 815 F.2d at 170; see Point III.A, *supra* (summarizing other authority upholding summary jurisdiction over post-petition disputes in bankruptcy courts).

Petitioner nonetheless insists that Article III should not be understood to distinguish between pre- and post-petition contracts because both involve state law claims.

Pet. Br. 18-20. But even though state law is implicated in both cases, the timing and the relationship of the dispute to the administration of the estate make a critical constitutional difference between pre- and post-petition contractual disputes. Moreover, this Court has not embraced the principle that all state law claims may be tried only in Article III courts (if they are to be adjudicated before a federal tribunal), and it could not adopt petitioner's principle without ruling *ultra vires* the actions of innumerable administrative agencies, see, *e.g.*, *CFTC* v. *Schor*, 478 U.S. at 851-857 (upholding CFTC's jurisdiction over state law counterclaims); *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. at 583; *Crowell* v. *Benson*, 285 U.S. at 51, and legislative courts such as the courts for the territories and the District of Columbia, see *e.g.*, *Palmore* v. *United States*, 411 U.S. 389, 407 (1973); Pet. App. A22, all of which daily adjudicate "private rights" and none of whose judges enjoys life tenure or salary protection. Nearly a century of adjudicating post-petition disputes in non-Article III bankruptcy courts is persuasive evidence that no Article III adjudicator is required.

Third, the need is overwhelming for adjunct bankruptcy judges to have power to enter final judgment on core matters referred to them by district courts. In 1989, 642,993 bankruptcy petitions were filed, and the pending caseload rose to an all-time high of 879,340 petitions. See *Annual Report of the Director of the Administrative Office of the United States Courts* 26-27 (1989). On July 1, 1988, 90,018 adversary proceedings were pending under the bankruptcy code, and during the next year more than 50,000 additional proceedings were filed. *Id.* at 366. If district courts cannot refer bankruptcy proceedings to adjunct bankruptcy courts, Congress could provide a unitary federal bankruptcy forum only by demanding a greater than 50% increase in the efficiency of the district courts (the 575 district judges would have to absorb the workload of 296 bankruptcy judges, see *id.* at 45-46), or, alternatively, Congress could add 296 Article III judgeships, see *ibid.*, which would at one stroke increase the number

of Article III judges by 41%. The first alternative is administratively hopeless; the second jeopardizes the carefully-nurtured institution of Article III judges—"a small group of revered, elite generalists, entrusted with enormous powers of constitutional governance over the other branches and the sovereign states." Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L. J. 233, 261 (1989). In sum, the threat to the Article III judiciary as we know it is not that the current bankruptcy judges perform Article III tasks, but that the Article III judges might have to perform the chores now handled by the bankruptcy judges.

Fourth, the absence of any threat to the Judiciary is clarified by this Court's decisions since *Marathon*. "In cases specifically involving the Judicial Branch," this Court has been "vigilan[t] against two dangers:

> first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' *Morrison* v. *Olson*, 487 U.S. [654, 680 (1988)], and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.' *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S., at 851."

Mistretta v. *United States*, 488 U.S. 361, 383 (1989). The provisions of the 1984 Bankruptcy Act present neither danger.

Petitioners do not contend that the 1984 Act burdens the Judiciary with any work it is unsuited to perform. To the contrary, they argue that the 1984 Act withdraws from the superintendence of Article III judges matters that are solely within their provenance. That withdrawal is purportedly accomplished by the provision for appellate-style review in district courts of final decisions entered by bankruptcy courts in core proceedings. See Pet. Br. i, 45.

The 1984 Act does not limit district courts to appellate review of final decisions of bankruptcy courts. The provision in 28 U.S.C. 157(b)(1) that "[b]ankruptcy judges

may hear and determine" core proceedings must be read together with 28 U.S.C. 151, which provides that such authority may be exercised "except as otherwise provided by * * * rule or order of the district court." The latter provision permits the district court to retain *de novo* review over all proceedings referred to the bankruptcy court, even core proceedings. In effect, the 1984 Act merely permits district courts to exercise appellate review over final decisions of bankruptcy courts. That relaxation of otherwise total control over adjunct bankruptcy courts is not mandatory. It mistakes a power for a constraint to say that this provision threatens the institutional integrity of the Judiciary. As in *United States* v. *Raddatz*, 447 U.S. 667 (1980), where this Court rejected an Article III challenge to a magistrate's authority to hear a suppression motion in a criminal case and to make proposed findings and recommendations to the district court concerning the proper disposition of the motion, "the entire process takes place under the district court's total control and jurisdiction." *Id.* at 681. "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department." *Id.* at 685 (Blackmun, J., concurring).

In addition, "clear error" review of final decisions rendered by bankruptcy courts in core proceedings would not insulate the bankruptcy courts from superintendence by the Article III Judiciary. In *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 498-499 (1984), this Court addressed an analogous conflict between the clear error review prescribed by Federal Rule of Civil Procedure 52(a) and the obligation of appellate courts to undertake an independent examination of the whole record in public figure libel cases. This Court observed that "[t]he conflict between the two rules is in some respects more apparent than real," *id.* at 499, because clear error review permits review of the whole record and because the degree of deference to the trial court's findings depends on whether the evidence is testimonial or documentary, whether the trial is long or short, and

whether the inferences drawn are strong or weak, *id.* at 500-501. Although the *Bose* Court concluded that the First Amendment "assigns to judges a constitutional responsibility that cannot be delegated," *id.* at 501, no precedent of this Court incorporates a similar standard in Article III.

Furthermore, appellate review in an Article III court is a sufficient exercise of "the judicial power" to satisfy that Article. Article III does not require that courts staffed by life-tenured judges protected against salary reduction themselves adjudicate from start to finish all cases within the federal judicial competence. The Framers' omission of any requirement that Congress establish federal trial courts makes that point clear; indeed, the lower federal courts did not enjoy federal question jurisdiction until 1875, Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. Article III thus invites the holding that "the Constitution gives Congress wide discretion to assign the task of making the initial decision in a case arising under federal law to administrative agencies, but requires judicial review to assure the supremacy of law." Bator, *supra*, 65 Ind. L.J. at 269; see Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 918 (1988); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197, 226-229.

In *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court made clear that Article III is satisfied when an administrative agency's decision is subject to review in an Article III Court to ensure that it is consistent with law —*i.e.*, that the agency has properly construed and applied the applicable law and that the evidence is sufficient as a matter of law. The Court stated that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Id.* at 51. Accordingly, the Court held that a non-Article III agency could make factual determinations under a workers' compensation act. *Id.* at 60-61. By the same token, this Court customarily exercises its original jurisdiction

by appointing special masters who need not be Article III judges, and the Court "regularly acts on the basis of the master's report and exceptions thereto." *United States* v. *Raddatz*, 447 U.S. 667, 683 n.11 (1980).

In this troubled and complex area, this Court should uphold, if possible, the attempt by Congress and the President—co-equal branches both, and sworn to uphold the same Constitution—to mark the line between valid and invalid grants of authority.

2. *The Seventh Amendment Does Not Require An Article III Judge to Preside Over A Jury Trial*

Allowing a bankruptcy judge to preside over a jury trial in a core proceeding would not violate a party's Seventh Amendment right. The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Seventh Amendment issue may be divided into two questions: whether a bankruptcy judge can preside over a jury trial, and whether the district court's review violates the Re-examination Clause.

a. The court of appeals below did not address the question whether a bankruptcy judge can conduct a jury trial. The earliest precedent of this Court bearing on the question appears to be *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899). In that case, the Court held that Congress could provide a jury trial on an appeal taken to an Article III court from a verdict in a jury trial presided over by a District of Columbia justice of the peace. The Supreme Court upheld the statute by holding that the first jury trial was not a Seventh Amendment jury trial, so that the jury trial on appeal (which was before an Article III court and so clearly was a Seventh Amendment jury trial) did not violate the Re-examination Clause. 174 U.S. at 45. Moreover, the Court ruled that

a justice of the peace, alternatively described as a magistrate, *id.* at 18, 31, could not superintend and direct a jury trial within the intendment of the Seventh Amendment. *Id.* at 14-16, 18, 38-39, 43, 45. The Court explained that the superintendence and direction of the jury was part of the Seventh Amendment right, *id.* at 15-16, and that the D.C. justice of the peace did not have the requisite authority, *id.* at 38-39.

Although *Hof* implies that no adjudicator with powers conferred solely by Congress could have sufficient authority to conduct a jury trial guaranteed by the Seventh Amendment, see 174 U.S. at 17, 38-39, this Court rejected the "broad" reading of *Hof* in *Pernell* v. *Southall Realty*, 416 U.S. 363, 380 (1974). The *Pernell* Court held that English justices of the peace presided over jury trials that were "jury trial[s] in the full constitutional sense." *Ibid.* That English justices of the peace were required to be learned in the law, were members of courts of record, and employed procedures similar to those followed in the common law courts sufficed for Seventh Amendment purposes. *Ibid.* Read together, *Hof* and *Pernell* suggest that a sufficiently "judicial" Article I judge may preside over a jury trial consistent with the Seventh Amendment. This conclusion is further supported by the fact that Article I judges of the District of Columbia courts preside over Seventh Amendment jury trials every day, and this Court has never questioned that practice. See 416 U.S. at 367. As one commentator concludes: "Bankruptcy judges, like the *Pernell* superior court judges and unlike the *Hof* justices of the peace, are judges presiding over courts of record. They possess the legal training and ability to instruct jurors on the law, advise them concerning the facts, and set aside inappropriate verdicts. The seventh amendment thus appears to pose no constitutional obstacle to jury trials conducted by bankruptcy judges." Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967, 1037-1038 (1988) (footnotes omitted).

b. The court of appeals did address the Re-examination Clause issue—*i.e.*, whether district court review of jury trials conducted in bankruptcy court would violate the Seventh Amendment. It summarily rejected the argument, pointing out that "[s]ince the jury verdict in a core proceeding is subject only to the traditional standards of appellate review, such proceeding does not violate the Seventh Amendment." Pet. App. A21. The court of appeals' analysis is correct. Section 158 of Title 28 does not require a district court to subject a jury verdict in a core proceeding to review any more stringent than what would be applied by an appellate court. Moreover, the Seventh Amendment expressly permits "re-examination" of a jury verdict "according to the rules of the common law." Appellate review of a jury verdict rendered in a core proceeding would thus not violate the Re-examination Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

2. 28 U.S.C. 157 provides:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13, of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334 (c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c) (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

3. 28 U.S.C. 1334 provides:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but

not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property wherever located, of the debtor as of the commencement of such case, and of property of the estate.

4. 28 U.S.C. 1411 provides:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA and
KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONERS

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PETITION FOR CERTIORARI FILED MAY 8, 1990
CERTIORARI GRANTED JUNE 28, 1990

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No. 89-1784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA and
KERWICK & CURRAN, INC.,

Petitioners,

v.

BEN COOPER, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The petitioners, The Insurance Company of the State of Pennsylvania ("ICSP") and Kerwick & Curran, Inc., submit this brief in reply to the briefs of the respondent, Ben Cooper, Inc. and the intervenor, the United States.

SUMMARY OF ARGUMENT

The Court of Appeals for the Second Circuit had jurisdiction over the appeal below. The district court order appealed from satisfies the finality requirements of 28 U.S.C. §1291; alternatively, jurisdiction was proper under 28 U.S.C. §1292(a)(1). The intervenor's arguments concerning appealability are merely a procedural gambit, rife with gaps in logic, designed for no greater purpose than to channel the Court's thinking in the intervenor's direction. In essence, the intervenor argues that if this is a core

matter, the court of appeals had proper jurisdiction and, conversely, if this is a non-core matter, it did not. This argument fails for several reasons, not the least of which is that it ignores the very substance and nature of the district court's order.

The respondent and the intervenor argue that the post-petition timing of the contract *ipso facto* converts the private state law contract dispute into a public right. The teachings of *Marathon* and *Granfinanciera* refute this contention. Congress cannot properly delegate full adjudicatory power over the instant garden-variety contract dispute to an article I forum, and it should not be presumed that Congress attempted to do so. Neither does a private litigant consent to bankruptcy court jurisdiction by the act of entering into an insurance contract with a debtor in possession.

A constitutional right cannot be waived unknowingly. Respondent's and intervenor's arguments that the petitioners have waived their seventh amendment right by implication from the act of contracting with respondent ignores settled constitutional mandate. Furthermore, petitioners have not consented to the bankruptcy court's jurisdiction; they have never filed a proof of claim against respondent's estate. To the contrary, petitioners have objected to the jurisdiction of the bankruptcy court and timely demanded a jury trial at the inception of this dispute.

Moreover, whether parties expressly consent to jurisdiction or waive the right to trial by jury in an article III forum is irrelevant if the Constitution prohibits Congress from delegating such adjudicatory power to an article I forum. Since Congress has not empowered bankruptcy judges by statute to conduct jury trials, it is not necessary for the Court to reach the question whether such a delegation of power comports with article III and the seventh amendment. Even if Congress had attempted to do so, delegation of essential attributes of the judicial power to bankruptcy judges would impermissibly erode article III.

ARGUMENT

I. THE SECOND CIRCUIT HAD JURISDICTION OF THE APPEAL BELOW

A. *The Intervenor's Argument Is Premised On A Mischaracterization Of The District Court Decision.*

The intervenor's jurisdiction argument gets caught up in itself and creates issues which do not exist. The reason that neither the court of appeals nor the parties addressed the question of jurisdiction is that no such question is present. In essence, the Solicitor General is attempting to compel the Court to rule in favor of the intervenor on the merits of the core/non-core issue, or not at all. While the approach undoubtedly promotes an agenda of avoiding confrontation of the thorny questions engendered by this appeal, the legal components of the arguments advanced do not hold together.[1]

The Solicitor General's analysis breaks down at the very start when he seeks to dismember the district court's decision, stating that "[t]he district court entered three orders: it withdrew the reference of the case to the bankruptcy court, it abstained in favor of the state court action, and it dissolved the bankruptcy court's injunction staying that state court litigation [and] Respondent appealed only the first of those orders—the district court's withdrawal of the reference to the bankruptcy court." U.S. Br. 10.[2] This characterization of the district court's oral ruling misconstrues the record and ignores the substance of the appeal.

As discussed below, the district court's order clearly satisfies finality standards for appeal. The Solicitor General concedes that the abstention element of the decision rendered the withdrawal of the reference reviewable. U.S. Br. 12-13.[3] Then, apparently

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[1] If the Court nevertheless agrees with the intervenor's position in Point I of his brief, the appropriate remedy is to vacate the decision below and remand the case with instructions to reinstate the order of the district court. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976).

[2] References to "U.S. Br." followed by a page number indicate reference to the intervenor's brief.

[3] Clearly, the withdrawal of the reference and dissolution of the bankruptcy court injunction became final under 28 U.S.C. § 1291 by virtue of the court's abstention. *See* Point I. B, *infra*.

ignoring his earlier view that the appeal related to "only the first" order, the withdrawal of the reference, the Solicitor General limits his focus to the abstention, analyzing it in isolation as "a final decision." U.S. Br. 13-16.[4]

The district court's order must be viewed as a whole. The order, once recognized as a single final decision, satisfies even the Solicitor General's criteria for appealability. The nature and basis of the district court's abstention ruling, with which the Solicitor General is obsessed, are irrelevant. Respondent's appeal was not from the district court's decision to abstain, but, rather, the oral decision and order as a whole.[5]

Recognizing that his jurisdiction argument would also fail if one were to analyze the appealability of the dissolution of the bankruptcy court's injunction, the Solicitor General flatly states that no appeal was taken with respect to that aspect of the district court's ruling. U.S. Br. 10. This assertion is incorrect. While respondent specifically stated in its brief below that it was not appealing the abstention ruling, it made no such representation as to any other aspect of the order and, it is submitted, there is no basis for inferring a further limitation. Cooper's Ct. App. Br. 6 n.*.[6,7]

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[4] At one point, the Solicitor General proposes that in the course of the district court's oral decision, Judge Stanton made a number of "interlocutory rulings" culminating in the abstention. Actually, in terms of sequence of events, the last element of the ruling was the dissolution of the bankruptcy court's injunction, something which the district court was theoretically without power to do, having already abstained. Such a nonsensical analysis is, of course, the product of taking a single order and decision, engaging in the fiction of breaking it up into parts, and giving special meaning to the sequence in which the court addresses the various issues before it.

[5] Respondent's notice of appeal cannot reasonably be construed to limit the scope of the appeal to only a segment of the district court's order. To do so would be illogical, inconsistent with what ultimately was the substance of the appeal, and contrary to established principles. *Foman v. Davis*, 371 U.S. 178, 181 (1962); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988). In any event, since the district court's order was final, any segment of the order which was reviewable, was appealable. *See* Point I. B, *infra*.

[6] References to "Cooper's Ct. App. Br." followed by a page number indicate reference to the respondent's brief to the Court of Appeals for the Second Circuit.

[7] In an effort to bolster his argument, the Solicitor General implies that an order which would be appealable at the time it is entered, might subsequently become

(*Footnote continued*)

In support of the claim that the injunction was not part of the appeal, the intervenor's brief cites the opinion of the court of appeals which states that the respondent did not raise that issue. U.S. Br. 10, citing A-7.[8] The comment is taken out of context. The Second Circuit had noted the parties' agreement that the primary issues involved were "(1) whether the adversary proceeding is core, and (2) whether appellees are entitled to a jury trial, . . ." A-6-7. The district court's conclusion that this dispute involved a non-core matter in which petitioners were entitled to a jury trial was integrally related to its conclusion that the reference must be withdrawn and, therefore, required that the district court dissolve the bankruptcy court's injunction, which is precisely what Judge Stanton did. That the injunction was not separately addressed in the court of appeals did not extinguish the appealability of the order.

The respondent's appeal sought a reversal of the district court's decision, and a return of the matter to the bankruptcy court, obviously not so that identical litigations would then proceed on parallel tracks in the state court and the bankruptcy court. The respondent's appeal below, therefore, necessarily encompassed all aspects of the district court's order, save only the abstention ruling which respondent understood to be unreviewable. It is undeniable that both the dissolution of the injunction and the district court's withdrawal of the reference are inextricably intertwined with the viability of the bankruptcy court's jurisdiction.

B. *The District Court Order Was Appealable As A Final Order Under 28 U.S.C. § 1291.*

The Solicitor General recognizes that 28 U.S.C. § 1291 is applicable to the appealability issue before the Court. U.S. Br. 13.

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not appealable because of the appellant's arguments in the appellate court. "Respondent's tack in the court of appeals raises a serious jurisdictional issue." U.S. Br. 10. Not only is there no support in the record for the substance of the argument, but the theoretical framework is fallacious. Whether or not an order or ruling is appealable is determined on the basis of the record below and the order itself.

[8] The Solicitor General is wrong when he states that "[r]espondent explicitly said it was not appealing from" the decision to lift the stay. U.S. Br. 10. In support

(*Footnote continued*)

As discussed above, the district court entered a single order. Although the respondent did not seek to argue that the abstention was improper – an issue it considered unreviewable – the fact that the district court did abstain cemented appellate jurisdiction because the abstention rendered the order final. *See* 28 U.S.C. §1291; *See Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 9 (1983)(if order contemplates that suit will not return to federal court it is final, for purposes of appeal).

The instant case is distinguishable from several superficially similar matters in which the courts have considered the appealability of a withdrawal of reference (a fact that the Solicitor General does not dispute). There is little question that if the district court had withdrawn the reference of this matter but had not abstained, a different analysis would apply.[9] In this case, however, the district court's order viewed in its entirety presents appellate jurisdiction under § 1291.

In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Court discussed the circumstances under which a collateral order will be immediately appealable under § 1291: to wit, if it 1) conclusively determines a disputed question; 2) resolves an important issue separate from the merits; and 3) would be effectively unreviewable on appeal from a final judgment. *Cohen* and its progeny provide for an appeal in the circumstances which are present in this case. The district court's determination that the dispute between petitioners and respondent was not core; was not properly before the bankruptcy court; should be tried by a jury; and should be heard in the state court, satisfies the *Cohen* requirements, including that element which is often found wanting, *i.e.*, that the order would be effectively unreviewable on

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of this statement, the Solicitor General cites to the court of appeals decision below, not the respondent. In fact, respondent only said it was not appealing the abstention. Cooper's Ct. App. Br. 6, n*.

[9] Ordinarily, as the Solicitor General points out, the decision of the district court to withdraw the reference from the bankruptcy court is not appealable as such. U.S. Br. 10-11. *See, e.g., In re Chateauguy Corp.*, 826 F.2d 1177, 1179-80 (2d Cir. 1987); However, all of these decisions involve matters where jurisdiction of the withdrawn matter was retained by the district court. The analysis of the withdrawal would change if it involved surrendering jurisdiction to a state court. *Cf. Elscint, Inc. v. First Wisconsin Fin. Corp. (In re Xonics, Inc.)*, 813 F.2d 127, 129-130 (7th Cir. 1987).

appeal from a final judgment.[10] The district court, by abstaining, made the withdrawal of the reference, the lifting of the stay, and the right to a trial by jury all properly reviewable by immediate appeal. *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

The Solicitor General's abstention argument, U.S. Br. 13-17, is a red herring. The reviewability, *vel non*, of the abstention is irrelevant. Judge Stanton's decision to abstain[11] made the other parts of the order, which were otherwise reviewable, appealable because the abstention rendered the order final in federal court.

C. *The District Court's Lifting Of The Injunction Was Appealable Under 28 U.S.C. § 1292(a)(1).*

There is no dispute as to the appealability under 28 U.S.C. § 1292(a)(1) of the district court's lifting of the injunction. U.S. Br. 11, n.4. *See Nat'l Labor Relations Bd. v. Goodman (In re Goodman)*, 873 F.2d 598, 601-02 (2d Cir. 1989) (order refusing to dissolve injunction is appealable under 28 U.S.C. § 1292(a)(1)).[12] The Solicitor General points out that the "stay order" was "inextricably bound up" with the court's decisions to abstain and to withdraw the reference. U.S. Br. 11 n.4.

Title 28 U.S.C. § 1292(a)(1) provides a basis for immediate appeal of "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving

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[10] The district court's rulings as to the core/non-core issue, the right to a jury trial, and the proper forum for the litigation are final because these issues will not be before the state court.

[11] The intervenor also misrepresents the distinction between permissive and mandatory abstention. U.S. Br. 16. Mandatory abstention relates only to non-core matters. 28 U.S.C. § 1334 (c)(2). Permissive abstention, however, relates to both core and non-core matters. §1334 (c)(1) applies to proceedings "arising under title 11 or arising in *or related to* a case under title 11." (emphasis added).

[12] The intervenor's view that the stay was under 28 U.S.C. §362(a) and (d)(1) is in error. The injunction was granted on motion, J.A. 12, and concerned matters outside the purview of the automatic stay under § 362 which, as the name implies, springs to life without the necessity of a motion.

injunctions, . . ." One need not go outside the literal terms of the statute to find an independent ground for appellate jurisdiction. Judge Stanton's ruling specifically addressed and lifted the "preliminary injunction" issued by the bankruptcy court, which had enjoined the continued prosecution of the state court action pending the hearing and determination of the adversary proceeding. A-26-28.

The Solicitor General argues that, notwithstanding § 1292(a)(1), the district court's dissolution of the injunction was not appealable since such appeal would entail review of the abstention (allegedly prohibited under § 1334(c)(2)). U.S. Br. 11 n.4. This reasoning is supported neither by logic nor legal authority. Moreover, while the viability of the bankruptcy court's jurisdsiction and the injunction it issued were intertwined, the abstention was a completely separate matter which had no impact on either jurisdiction or the injunction.

II. *MARATHON* AND *GRANFINANCIERA* REQUIRE A NON-CORE DESIGNATION OF THE UNDERLYING CONTRACT DISPUTE

The respondent and the intervenor insist that a claim under a post-petition contract concerns a public right. The BAJFA, however, manifests no intent to transform breach of contract actions from common-law disputes into public-right disputes appropriate for non-article III adjudication. The modern article III jurisprudence of this Court articulated in *Marathon* and *Granfinanciera* belies the contention of the respondent and the intervenor that a public right designation for common-law contract actions would be constitutional.

> . . . [T]he [*Marathon*] plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. The plurality

> further said that "matters from their nature subject to 'a suit at common law or in equity or admiralty'" lie at the "protected core" of Article III judicial power.

Granfinanciera, S.A. v. Nordberg, ____ U.S. ____, ____ 109 S. Ct. 2782, 2797-98 (1989).

A right to recover under an insurance contract is not a congressionally created right, like the statutory right at issue in *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985), but is rather a state common-law right whose adjudication involves no federal rule. The Constitution sets limits to the power of Congress to delegate adjudication, even of statutory rights, to a non-article III forum.

> If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.

Granfinanciera, 109 S. Ct. at 2797. Where no bankruptcy principle governs the resolution of the dispute, the dispute cannot be said to be closely intertwined with a federal regulatory program.

Granfinanciera made clear that even where Congress has labeled an action or claim as a core matter, purporting to constitute it a public right, constitutional requirements override congressional intent. The underlying contract dispute does not even fall within any statutory provision purporting to constitute it a public right and a core bankruptcy matter.

Claims by the debtor against a non-creditor appear nowhere in 28 U.S.C. §157(b)(2). It cannot credibly be argued that Congress expressly constituted contract actions involving post-petition contracts as core matters by creating a core designation for "matters concerning the administration of the estate." Subsection 157(b)(2)(A) by its terms embraces no categories of "actions" or "claims," but rather *administrative matters*, such as hiring or firing or compensation of a trustee. The wording of § 157(b)(2)(A) does not suggest that it applies to anything outside the substantive law of bankruptcy.

The general language of §157(b)(2)(A) cannot be interpreted to bring the underlying contract action within the rule of *Atlas Roofing Co., Inc. v. OSHRC*, 430 U.S. 442 (1977) and *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568 (1985). It is equally clear that the rule of *Atlas Roofing* and *Thomas* cannot be invoked by references to legislative history (in fact, merely comments by one representative) suggesting an intent to provide for broad bankruptcy jurisdiction. The creation of a public right replacing a private right and the relegation of disputes concerning the new right to a non-article III forum cannot be demonstrated by such casual and informal "evidence."

Atlas Roofing and *Thomas* involved rights that but for an act of Congress would not exist.[13] The statutes in question specifically provided that disputes arising out of those statutorily created rights would be resolved by non-article III decisionmakers.

This Court held that the *Marathon* rule was not controlling in *Thomas* because the right to compensation at issue in *Thomas* arose under FIFRA and did not depend on or replace a right created and controlled by state law. *Thomas*, 473 U.S. at 583. For the same reasons that *Marathon* was not controlling in *Thomas*, *Thomas* is not controlling here. The BAFJA does not operate to bring the underlying insurance dispute before a non-article III decisionmaker.

The intervenor and the respondent, relying on *Arnold Print Works, Inc. v. Apkin*, 815 F.2d 165 (1st Cir. 1987), hark back, in their examination of the core/non-core issue, to tradition developed under the Bankruptcy Act of 1898 (the "1898 Act").[14]

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[13] In *Atlas Roofing*, the petitioner contested a congressionally enacted statute under the Occupational Safety and Health Act which provided that the imposition of civil penalties against an employer for maintaining unsafe working conditions could be challenged before an administrative law judge of the Occupational Safety and Health Review Commission whose findings of fact would be deemed final. In *Thomas*, the petitioners, pesticide manufacturers, challenged a congressionally created statute under the 1978 Amendments to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), which provided for a binding arbitration of disputes arising out of the data use and compensation scheme.

[14] In a recent case addressing the core/non-core dichotomy, the Third Circuit observed, "[t]he *Arnold* [*Print Works*] court distinguished *Marathon* by noting

(*Footnote continued*)

An analysis buttressed by the jurisdictional scheme of that long-repealed Act is anachronistic and untenable in the light of *Marathon* and *Granfinanciera*. Those are landmark, watershed cases construing article III parameters in the bankruptcy context. The structure of jurisdiction of the 1898 Act was never challenged in this Court on article III grounds and, accordingly, never sanctioned by this Court.[15]

The analysis propounded in *Arnold Print Works* and in the opinion of the court of appeals below contravenes the recent article III jurisprudence of this court. The limited holding of *Marathon* (set forth in Justice Rehnquist's concurrence) applies to traditional common law contract actions arising under state law. That characterization indisputably embraces the insurance dispute at issue here.[16]

The intervenor contends that the underlying dispute "falls within the literal wording of § 157 (b)(2)(A)." U.S. Br. 19. As noted, *supra*, all that subsection says is "matters concerning the administration of the estate." The intervenor further asserts:

> The efforts of a trustee or debtor-in-possession to protect and preserve the *res* of the estate by insuring its assets fit squarely within long-accepted notions of "administration of the estate" [citation omitted].

U.S. Br. 20. The petitioners do not dispute that the fulfillment or non-fulfillment by a trustee or debtor of duties under a plan might properly be characterized as matters concerning the administration of the estate. That category would not, however, encompass a state-law breach-of-contract action against a non-creditor. The intervenor's argument conflates two entirely different sorts of proceedings. Under *Marathon* and *Granfinanciera*, a common law

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that in *Marathon* the contract claim arose pre-petition, while in *Arnold* the contract claim was based on a post-petition contract. While we agree with the *Arnold* court that in fact *Marathon* was based on pre-petition conduct, there is no indication that either the plurality or the concurrence relied on this distinction." *Beard v. Braunstein*, 914 F.2d 435 (3d Cir. 1990).

[15] *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 79 n.31 (1982).

[16] The *Granfinanciera* court refrained from characterizing even the "restructuring of debtor-creditor relations" as a public right. 109 S. Ct. at 2797 n.11.

contract action is not appropriate for non-article III adjudication and cannot be made so simply by characterizing it as a matter of administration.

The phrase "long accepted" in the intervenor's argument is signal and telling. The cornerstone concepts of the arguments of respondent and intervenor are the supposed transformational effect of the filing of the bankruptcy petition; and the alleged far-reaching effect of "contracting with an officer of the bankruptcy court." That historically such factors were viewed under a bygone statutory scheme as supporting summary adjudication—which no longer exists—is not even pertinent in the wake of this Court's recent article III and private rights jurisprudence.

The intervenor relies heavily on the significance of the creation of the bankruptcy estate and the concomitant duty of the debtor to protect the *res*. U.S. Br. 33-34. The same *res* existed pre-petition in the form of the debtor's assets. The invocation of bankruptcy protection works no change in the assets insured, or in the rights and duties of insureds or insurers under policies of insurance. In suits on pre-petition contracts, just as in suits on post-petition contracts, the dispute arises or at least continues after the creation of the bankruptcy estate: otherwise, there would be no question of bankruptcy jurisdiction presented. Recovery on a post-petition contract has no more or less effect on "estate administration" than recovery on a pre-petition contract.[11] No viable explanation has been offered as to why the *Marathon* private rights doctrine does not apply to an action on a post-petition contract.

The respondent states that the contract action is a matter of administration. However, it is not: it is a contract action. The respondent says the contract action concerns the bankruptcy estate because the bankruptcy estate has been formed when the contract is formed. Respondent does not explain, however, how issues of contractual liability and damages become bankruptcy issues; and how or why the adjudication of contract issues should differ, depending on the timing of the contract.

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[11] It should be noted that neither the respondent nor the intervenor set forth any basis for subjecting petitioner Kerwick & Curran, Inc. to the bankruptcy court's core jurisdiction. The arguments advanced focus entirely on ICSP's contract of insurance which, it is contended, constitutes consent to core jurisdiction.

Marathon and *Granfinanciera* constitute the modern parameters of bankruptcy jurisdiction. The present case does not "comfortably qualify" as a matter "at the heart of the administration of the bankruptcy estate." U.S. Br. 24. The "core" of bankruptcy jurisdiction is a concept developed in *Marathon* and *Granfinanciera*. Those cases nowhere intimate that a suit for contract damages against a non-creditor falls anywhere near the core, which those cases state to be "the restructuring of debtor-creditor relations." *Marathon*, 458 U.S. at 71; *Granfinanciera*, 109 S. Ct. at 2797.

III. PETITIONERS ARE ENTITLED TO A JURY TRIAL FOR WHICH THE BANKRUPTCY COURT CANNOT BE THE PROPER FORUM

A. *Petitioners Have Neither Consented To The Bankruptcy Court's Jurisdiction Nor Waived Their Seventh Amendment Rights.*

The respondent and the intervenor argue that by the act of contracting with a debtor in possession, the petitioners have consented to the bankruptcy court's jurisdiction and thereby waived their right to a jury trial. Resp. Br. 30 n.31[8] and U.S. Br. 27-28. This proposition ignores basic constitutional mandates.

It is nonsense in the post-*Marathon* era to insist that by the act of contracting with the debtor, petitioners consented to core bankruptcy jurisdiction. The lesson of *Marathon* was that litigants' common law and constitutional rights are to be preserved. The petitioners could certainly not have expected to be governed by rules derived from traditional practice under a repealed nineteenth-century statute.[9] Likewise, the terming of the debtor in possession "an officer of the court," an inapt label in this context, and the denomination of the debtor's assets as "the bankruptcy estate" do not supply a reason for relegating common-law contract issues—identical in or out of bankruptcy—to a non-article III forum.

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[8] References to "Resp. Br." followed by a page number indicate reference to the respondent's brief.

[9] It should additionally be noted that respondent and intervenor do not adduce any decision of this Court to buttress the claim that the effect of a post-petition contract was to invoke summary adjudication by the referee.

The intervenor's reliance on *Katchen v. Landy*, 382 U.S. 323 (1966) as the basis upon which to argue that petitioners have submitted "to the equitable power of the bankruptcy court," U.S. Br. 28, is misplaced. In *Katchen*, the Court held that a creditor, by filing a claim against the estate in a bankruptcy proceeding, had subjected himself to the bankruptcy court's summary jurisdiction for the adjudication of the trustee's counterclaim. The Court noted that if the creditor had not filed his claim in the bankruptcy proceeding, the trustee would have been forced to bring "a plenary action . . . in the federal courts [where] the creditor could have demanded a jury trial." *Id.* at 327-28. The creditor's actions in *Katchen* and the petitioners' actions are not comparable. Unlike the creditor in *Katchen*, the petitioners have not submitted claims and are not creditors of the estate.

The intervenor's contention that the petitioners have consented to the equitable jurisdiction of the bankruptcy court (by the act of contracting with the respondent) is further rebutted by the views expressed by this Court in *Commodities Future Trading Comm'n v. Schor*, 478 U.S. 833 (1986) and *Granfinanciera*. In *Schor*, although the litigants had "indisputably waived" their right to trial in an article III court by *electing* to proceed before an administrative agency, the Court cautioned that "notions of consent and waiver cannot be dispositive because the [article III] limitations serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851. In other words, whether parties consent to the jurisdiction of an article I tribunal is irrelevant if article III prevents Congress from delegating the adjudicatory power in the first place. The intervenor's consent argument is premised entirely upon the fallacious assumption that Congress can delegate adjudicatory powers, thereby converting state-law claims into "public rights" under the purview of its article I bankruptcy power. *See* discussion, *supra*, at 8-9.

The intervenor's argument that the petitioners have waived their seventh amendment rights is as unconvincing and contrary to constitutional principles as its consent argument. The seventh amendment right to a trial by jury cannot be waived unknowingly or by implication as the intervenor contends. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464

(1938)(waiver of sixth amendment right to counsel). Since the "right of a jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)(discussing waiver of jury right in civil trial). Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937)(discussing denial of due process in regulatory setting). It is preposterous to assert that the seventh amendment right, a constitutional right, can be waived by the act of contracting with a debtor in possession.

B. *Since Congress Has Not Authorized Bankruptcy Judges To Conduct Jury Trials, Constitutional Issues Need Not Be Addressed.*

The intervenor concedes that there is no statutory empowerment under the BAFJA, either express or implied, for bankruptcy judges to conduct jury trials. This is consistent with the petitioners' position as supported by recent decisions in the Eighth and Tenth Circuits. *See In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990), and *In re Kaiser Steel Corp.*, 911 F.2d 380 (10th Cir. 1990). In addition to the arguments advanced in petitioners' brief, Point V. B, petitioners adopt the arguments advanced by the intervenor that Congress did not intend for bankruptcy judges to conduct jury trials.[20]

Respondent, however, advances the argument that 28 U.S.C. § 1411 and Bankruptcy Rule 9015 can be used to infer a statutory basis for jury trials in bankruptcy court. These arguments do not

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[20] Of note is the intervenor's third argument, U.S. Br. 38, concerning the lack of congressional intent. The intervenor contends that because Congress's purpose in the BAFJA was "to create a bankruptcy court scheme which would avoid the constitutional pitfalls exposed by *Marathon*," Congress could not have intended to vest that "essential attribute of judicial power," the power to preside over a jury trial, in the bankruptcy court. U.S. Br. 38. The logical conclusion to be drawn from this proposition is that if Congress *had* attempted to vest that "essential attribute of the judicial power" in the bankruptcy court under the BAFJA, the dictates of the Court in *Marathon* and the Constitution would have been violated. The intervenor's position here is logically inconsistent with its later argument supporting the constitutionality of non-article III judges' conducting jury trials. U.S. Br. Pt. III. C.

comport with accepted practices of statutory construction. *See* Pet. Br. 37-39[2] and U.S. Br. 35-36.

Petitioners' statutory analysis, which finds neither express nor implied authority for the conduct of jury trials by bankruptcy judges (as conceded by the intervenor), should end the Court's inquiry. There is no reason to consider the article III and seventh amendment questions addressed in the respondent's and the intervenor's briefs. As the Court recently stated in *Gomez v. United States* ___ U.S. ___, 109 S. Ct. 2237, 2241 (1989), "[i]t is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative or interpretation poses no constitutional question." In *Gomez* this Court found that:

> [b]ecause we decide that the Federal Magistrates Act does not allow the delegation of jury selection to magistrates, we need not consider the second question presented in this case; *i.e.*, whether such a delegation would be constitutional.

Id. at 2246 n.25 (Federal Magistrates Act ("FMA") did not contemplate conduct of voir dire by magistrates). Likewise in the case at bar, the Court need not consider whether if Congress had expressly authorized the conduct of jury trials in bankruptcy courts such delegation of article III power to a non-article III tribunal would comport with the Constitution. Indeed, to reach these constitutional issues would be to render a mere advisory opinion. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937).

C. If Congress Had Attempted To Grant Bankruptcy Judges The Jury Trial Power, Such An Empowerment Would Violate Article III And The Seventh Amendment.

The intervenor advances the argument that the 1898 Act should serve as a point of comparison in analyzing the BAFJA because those two schemes are jurisdictionally similar, and both are unlike

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[2] References to "Pet. Br." followed by a page number indicate references to petitioners' brief dated August 20, 1990.

the 1978 Act. It is true that under the 1898 Act and the BAFJA, the bankruptcy "courts" are adjuncts to the district courts; under both statutes, the district courts theoretically retain ultimate control. The repealed 1898 Act, however, simply cannot be relied upon to advance the constitutionality of the post-*Marathon* BAFJA. *See* discussion, *supra*, at 10-11 (this Court has never passed on the constitutionality of the 1898 Act). It cannot, therefore, be assumed that the 1898 Act's jurisdictional scheme is a valid, constitutionally sound model upon which the intervenor's arguments may rest.[22]

The intervenor posits that if bankruptcy judges can conduct bench trials consistent with article III, then the presence of a jury works to minimize concerns regarding the independence of article I judges. U.S. Br. 40. This argument ignores several important features of the roles of not only juries, but also trial judges.

First, the standard of review of a jury's findings of fact is significantly different from the appellate review of a judge's findings of fact. While a jury's findings cannot be re-examined, a judge's findings of fact are not subject to the seventh amendment prohibition against re-examination. Therefore, the intervenor's assertion – that the lack of threat posed to article III when bankruptcy judges conduct bench trials *ipso facto* means that the presence of a jury poses even less of a threat – embodies a faulty syllogism. The petitioners have a precious constitutional right, the right to trial by a jury of their peers. The seventh amendment is not implicated when bench trials are conducted.

Second, it is not a simple matter of the jury's serving as a check on the judge; the judge also serves as a check on the jury.

> [A]s the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and

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[22] The intervenor also premises its arguments on an artificial distinction between article III and the seventh amendment. U.S. Br. Pt. II. C. This premise is flawed because the seventh amendment was intended as an amendment to article III. *Capital Traction Co. v. Hof*, 174 U.S. 1, 6-7 (1899). These sections cannot be viewed as two distinct items when analyzing whether non-article III judges may be empowered to conduct jury trials.

> enlightening the matter of fact, whereof the jury are judges. [Trial by jury] has the advantage of the judge's observation, attention and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.

Capital Traction Co. v. Hof, 174 U.S. at 14 (quoting Lord Hale, 2 Hale Hist. Com. Law (5th Ed.) 147, 156).

Judges rule "on evidentiary questions, on motions for mistrials and new trials, and on other matters requiring an assessment of the particular jury's ability and attentiveness; on these questions we defer broadly to the trial judge's judgment, in part because of his superior opportunity to evaluate the jurors." *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990) (held magistrates cannot conduct voir dire in civil jury trials in part because voir dire is a "vital stage of every jury trial"). The interaction between judge and jury is essential to the right guaranteed by the seventh amendment. *Gomez v. United States*, 109 S. Ct. at 2247. The power "to grant a new trial on the ground that the verdict was against the weight of the evidence" or to grant a judgment notwithstanding the verdict are within the unique province of an article III trial judge. 11 & 9, C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2806, 2521 (1973). *See* Fed. R. Civ. P. 59(a), 50(b). Allowing bankruptcy judges to preside over jury trials impermissibly cedes these essential attributes of judicial power to an article I court.

The intervenor also argues that if magistrates can conduct jury trials consonant with article III, so may bankruptcy judges. While several circuits have upheld the constitutionality of federal magistrates' authority to conduct jury trials, circuit courts have done so primarily because express consent of the parties is required by statute.[23],[24]

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[23] It must be noted that this Court has never passed on the constitutionality of magistrates' authority to conduct jury trials even with the requisite consent as a "safeguard" to private litigants' rights as well as to article III.

[24] 28 U.S.C. §§ 636(c)(1)-(3) provide safeguards to assure the voluntariness of litigants' consent to adjudication by a magistrate in the district court. "[N]either the district judge nor the magistrate shall attempt to persuade or induce any

(*Footnote continued*)

Some circuit courts have found that the consent provisions of the FMA sufficiently safeguard its constitutionality because "[t]he right of access to Article III judges . . . may be viewed . . . as personal to the litigants and therefore subject to waiver." *See, Geras v. Lafayette Display Fixtures Inc.*, 742 F.2d 1037, 1041 (7th Cir. 1984). Obviously, the petitioners have not expressly consented to a bankruptcy court jury trial nor are there any statutory safeguards in the BAFJA similar to those in the FMA.

The intervenor and respondent advance policy arguments based on statistics reflecting the number of bankruptcy filings and pending proceedings. Resp. Br. 33 and U.S. Br. 44. The statistics cited, however, do not represent the number of jury trials and/or state law claims presented to the bankruptcy courts annually.[25] Moreover, in weighing the competing values at stake, it is not only patently unfair, it is also most inappropriate that the petitioners' right to adjudication in an article III or state court forum should give way to the large number of Chapter 11 filings. The constitutional rights of private litigants cannot be vitiated in the search for the cure for the 1980s leverage hangover. Neither should the long-standing concern for the protection of article III and the judiciary as first expressed by the Framers be discarded based on a perceived need to accommodate the use of the bankruptcy courts for speedy adjudication.

Petitioners do not advocate an "hermetic sealing off of the three branches of Government," *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); there is necessarily some interplay among the branches. To delegate full adjudicatory power over private, common law actions to a non-article III tribunal, however, would impermissibly erode article III. *Granfinanciera*, 109 S. Ct. at 2796 (citing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)). In *Crowell v. Benson*, the Court weighed the "utility and convenience" of delegating

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party to consent to reference of any civil matter to a magistrate." 28 U.S.C. § 636(c)(2). *See, Adams v. Heckler*, 794 F.2d 303, 307 (7th Cir. 1986)("valid consent is the linchpin of constitutionality of 28 U.S.C. § 636(c)").

[25] There do not appear to be any statistics currently available on the number of jury trials demanded or conducted in the bankruptcy courts. One could reasonably assume, however, that the number of jury trials demanded is significantly smaller than the total number of petitions filed.

fact finding functions to administrative agencies against the limitations which article III imposes. The Court concluded that for Congress to vest

> the authority to make [determinations of fact] with finality in its own instrumentalities or in the executive department . . . would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

Id. at 56-57. As the Court enunciated in *Granfinanciera*, even in a congressionally enumerated core matter—a matter closer to the core of the adjustment of the debtor-creditor relationship than the contract dispute involved here—the personal right to trial by jury could not be obviated by Congress in its exercise of article I powers.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that the judgment of the court below be reversed with respect to its holding that this is a core proceeding and that a jury trial be conducted in the bankruptcy court and the ruling of the district court be reinstated.

Respectfully submitted,

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October 29, 1990

APPENDIX

APPENDIX

28 U.S.C. § 636. Jurisdiction, powers, and temporary assignment

* * *

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of district court. In this circumstance, the consent of the parties allows a magistrate

designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

* * *

MOTION FILED
AUG 20 1990

No. 89-1784

In the

Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,
Petitioners,

vs.

BEN COOPER, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

and

BRIEF OF UNITED MISSOURI BANK OF KANSAS CITY, N.A., AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONERS

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The United Missouri Bank of Kansas City, N.A. respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The consent of the attorneys for petitioners The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. has been obtained, but the attorney for respondent Ben Cooper, Inc. has declined to consent.

Applicant United Missouri Bank is the defendant in an adversary proceeding to recover allegedly preferential monetary transfers pending in the United States District Court for the Western District of Missouri styled *In re Kroh Brothers Development Company, et al.* v. *United Missouri Bank of Kansas City, N.A.*, Adversary No. 89-4035-1-11. Applicant United Missouri Bank was also the petitioner in a petition for writs of mandamus and prohibition filed in the United States Court of Appeals for the Eighth Circuit arising from said adversary proceeding in which the central issue was whether a bankruptcy judge acting under the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, has the statutory and constitutional authority to conduct jury trials in an adversary proceeding. *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990).

Contrary to the earlier holding of the Court of Appeals for the Second Circuit in the case at bar, the Eighth Circuit, on April 23, 1990, held that a bankruptcy judge lacks the statutory authority to conduct jury trials in an action alleging a preferential transfer between the debtor and a third-party creditor. *In re United Missouri Bank*, *supra*.

Applicant United Missouri Bank has a real interest in the outcome of this case because its right to a jury trial conducted by an Article III judge recognized by the Eighth Circuit Court of Appeals in the aforesaid mandamus and prohibition action may be jeopardized by a contrary opinion in this case.

Applicant United Missouri Bank perceives that important issues of statutory construction and constitutional law will not be fully presented by the parties to this case in view of the fact that the

issue of the constitutionality of jury trials conducted by Article I bankruptcy judges was not raised by the parties in their appeal to the Court of Appeals, *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1403 (2nd Cir. 1990), and the essential predicate question thereto, whether bankruptcy judges have the statutory authority to conduct jury trials, was not raised in the petitioners' petition for writ of certiorari to this Court in this case, matters which counsel for applicant United Missouri Bank has fully briefed and argued before the Eighth Circuit in *In re United Missouri Bank*, *supra*.

For the above and foregoing reasons, the United Missouri Bank of Kansas City, N.A. respectfully requests this Court to grant it leave to file its brief *amicus curiae* in this case.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

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United Missouri Bank has a real interest in the outcome of this case because its right to a jury trial conducted by an Article III judge recognized by the Eighth Circuit Court of Appeals in the aforesaid mandamus and prohibition action may be jeopardized by a contrary opinion in this case.

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SUMMARY OF THE ARGUMENT

Bankruptcy judges acting under the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA") lack express or implicit statutory authority to conduct jury trials in adversary proceedings. The language of BAFJA does not grant jury trial authority, and congressional and historical support for that authority is lacking. Given the absence of supporting legislative history, and the serious constitutional problems posed by bankruptcy judges exercising jury trial authority, BAFJA should be construed as not conferring such authority.

Even assuming Congress intended that bankruptcy judges be allowed to preside over jury trials, bankruptcy judges lack the constitutional authority to do so. The Constitution commands that all federal judicial authority must be exercised by an Article III court. Bankruptcy judges lack the intrinsic constitutional characteristics and essential attributes of Article III judges. To allow a bankruptcy judge to preside over a jury trial would represent a constitutionally impermissible delegation of judicial power to a non-Article III judge and would deprive an individual litigant of his constitutional right to a jury trial before an Article III judge.

The Seventh Amendment right to a jury trial presumes the personal presence of an Article III district judge. To allow a bankruptcy judge, not imbued with the attributes of an Article III judge, to preside over a jury trial is tantamount to a denial of the individual litigant's Seventh Amendment right to a jury trial. In addition, the standards of review established by Congress regarding orders entered by bankruptcy judges – *de novo* in non-core proceedings, "clearly erroneous" in core proceedings – do not comport with the standard for review of a jury verdict "according to the rules of common law" as required by the Seventh Amendment. Even assuming the district court could ignore or declare invalid the scheme of review established by Congress and could apply the "no substantial evidence" test when the matter finally came before it, such an approach would deprive the district court of the power and right to make the ultimate decision in the case and thus would violate Article III.

ARGUMENT

I.

There is No Statutory Authorization Afforded Bankruptcy Judges or Bankruptcy Courts to Conduct Jury Trials.

Despite the fact that a central issue in this case is a bankruptcy judge's constitutional power to preside over a jury trial, it is this Court's settled policy "to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez* v. *United States*, _____ U.S. _____, 109 S.Ct. 2237, 2241 (citations omitted). In this case, such an alternative interpretation of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (hereinafter "BAFJA") is afforded by the lack of express statutory authority and absence of legislative history in support of jury trials in bankruptcy courts. Indeed, as explained by the United States Court of Appeals for the Eighth Circuit in its well-considered opinion in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990), such an alternative interpretation of BAFJA "is not only reasonable, but necessary." *Id.* at 1457.[1]

In *In re United Missouri Bank* the bankruptcy trustee sought recovery of alleged preferential transfers against a bank that had not filed a claim against the debtor's estate. The bank requested a jury trial. Both the bankruptcy court and the district court held that under *Granfinanciera, S.A.* v. *Nordberg*, _____ U.S. _____, 109 S.Ct. 2782 (1989), the bank was entitled to a jury trial and that the bankruptcy court had the statutory authority to conduct such a trial. The Eighth Circuit agreed that the bank had a right to a jury trial but reversed the bankruptcy court and district court as to in which court the trial would be conducted and as to what judge would preside over the trial.

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1 On this point the Eighth Circuit found persuasive the recent decision of the Fifth Circuit in *In re Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir. 1990) (where constitutionality of bankruptcy courts exercising criminal contempt authority was questionable, court would construe BAFJA as not conferring that authority).

After an in-depth historical review of the authority of bankruptcy courts, the Eighth Circuit held there to be no express or implied statutory authority granted to a bankruptcy court to conduct jury trials. The court noted that BAFJA contained no specific or express language granting a bankruptcy judge authority to conduct jury trials. It further noted that "Congress has previously provided express statutory authority to conduct jury trials to a non-Article III tribunal, *see* 28 U.S.C. §636(a)(3), (c)(1) (1982) (statutory authority of magistrates to conduct jury trials in certain cases), and thus, we believe, is aware of the language necessary to expressly grant that authority. The language of the 1984 Act does not grant jury trial authority." *Id.*, 901 F.2d at 1454 (footnote omitted).

In concluding there was no implied authority, the Eighth Circuit stated (901 F.2d at 1456) (footnote omitted):

> [In enacting the 1984 Act] . . . Congress simply intended to transfer all proceedings relating to the bankruptcy estate to the sole jurisdiction of the bankruptcy court without regard to whether a party was entitled to a jury trial, or which forum would conduct the trial. In fact, it appears Congress did not even consider the need to provide jury trial authority. As the Supreme Court pointed out: "Thus, the 1984 Amendments' denial of the right to a jury trial in preference and fraudulent conveyance actions can hardly be said to represent Congress' considered judgment of the constitutionality of this change." *Granfinanciera*, 109 S.Ct. at 2800 n. 16. If Congress did not consider the constitutionality of denying jury trials, we doubt if it considered the need to provide for authority for the bankruptcy court to conduct a jury trial.

The Second Circuit below, although recognizing that there was no specific statutory provision authorizing jury trials, held there to be implied authority for jury trials in bankruptcy courts. The Second Circuit held that such authority must be implied to reconcile the congressional intent evident in the power granted

in BAFJA. The court reasoned that "*Granfinanciera* teaches that . . . [core] proceedings, if legal in nature, are subject to the Seventh Amendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders." *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1402 (2d Cir. 1990). According to the Second Circuit, construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns. *Id.*

As cogently explained by the Eighth Circuit in *In re United Missouri Bank*, the Second Circuit's reasoning is a "faulty syllogism." 901 F.2d at 1456. The reasoning of the Eighth Circuit that there is no statutory authority, express or implied, for jury trials to be conducted in the bankruptcy court is sound. Merely because the Second Circuit perceived it may be difficult to reconcile the holding in *Granfinanciera* with BAFJA does not warrant the implication that Congress intended something it apparently never considered.

II.

A Jury Trial in Bankruptcy Court Would Violate Article III of the Constitution.

Because the Eighth Circuit in *In re United Missouri Bank* properly found that there was "no statutory authorization afforded bankruptcy judges or courts to conduct jury trials on legal proceedings," 901 F.2d at 1457, the court there did not reach the constitutional questions[2] of whether jury trials conducted in the bankruptcy court would violate Article III and the Seventh Amendment. *Id.* The Second Circuit in the case below did reach the constitutional question and held that jury trials by bankruptcy courts in core proceedings did not violate the constitutional hurdles presented. *In re Ben Cooper*, 896 F.2d at 1403-04. Specifically, regarding the Article III considerations, the Second Circuit

2 *Cf. Gomez*, 109 S.Ct. at 2246 n. 25 (because this Court decided that the Federal Magistrates Act did not allow the delegation of jury selection to magistrates, this Court did not consider whether such a delegation would be constitutional).

reasoned that because "bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." *Id.* at 1403.

Like the Second Circuit's reasoning regarding the statutory authority issue, its reasoning regarding the Article III considerations is a "faulty syllogism." First, in reaching its conclusion, the Second Circuit assumed, without deciding, that the statutory authority of bankruptcy courts found in 28 U.S.C. §157(b) did not violate Article III. *Id.* at 1403. This assumption is open to serious question. *See In re Davis*, 899 F.2d 1136, 1140 n. 9 (11th Cir. 1990) (dictum). Second, even if 28 U.S.C. §157(b) is not unconstitutional in its entirety, jury trials presided over by bankruptcy judges do not comport with Article III.[3] In fact, where, as here, petitioners admittedly have a Seventh Amendment right to a jury trial,[4] exactly the opposite conclusion must necessarily follow, to-wit: Article III requires that any such jury trial be presided over by an Article III judge.

In *Granfinanciera* this Court declared unconstitutional Congress' statutory scheme under BAFJA which drastically restricted litigants' rights to jury trials. This Court there held that the Seventh Amendment entitles a person (such as petitioners here) who has not submitted a claim against a bankruptcy estate to a jury trial when sued by the trustee in bankruptcy, notwithstanding Congress' designation of fraudulent conveyance actions as "core proceedings" in 28 U.S.C. §157(b)(2)(H).

This Court in *Granfinanciera* specifically reserved ruling on the question of whether the jury trial mandated by the Seventh

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3 A most recent detailed analysis concluding that the bankruptcy court is without constitutional authority to conduct jury trials is found in Bankruptcy Judge Waldron's decision in *In The Matter of Hughes-Bechtol, Inc.*, 107 B.R. 552 (Bkrtcy. S.D.Ohio 1989). In addition to the constitutional issues Judge Waldron noted that there presently is no statutory authority whatever which specifically empowers a bankruptcy court to conduct a jury trial.

4 The Second Circuit below properly held that petitioners had a right to a jury trial. *In re Ben Cooper*, 896 F.2d at 1402. Respondent has not cross-petitioned for reversal of that ruling.

Amendment could be held in the bankruptcy court or whether it must be conducted by the district court. However, its opinion expressly recognized that "if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders *requires the same answer* as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal." 109 S.Ct. at 2796 (emphasis added). It is clear from the logic employed by the majority in *Granfinanciera* that any delegation of jury trial authority to a non-Article III bankruptcy judge would not comport with Article III (109 S.Ct. at 2796):

> For if a statutory cause of action, such as respondent's right to recover a fraudulent conveyance under 11 U.S.C. §548(a)(2), is not a "public right" for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking "the essential attributes of the judicial power" . . . [and] if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury fact finder.

Where, as here, petitioners are entitled to the protection of the Seventh Amendment, so too the resolution of this controversy must come within the judicial authority of the United States and is to be determined only by an Article III court.

A. A Jury Trial in Bankruptcy Court Would Violate the Concept of Separation of Powers.

Article III, Section 1. of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as

> the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

This "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . ." Article III, Section 2.

As noted by now-Justice Kennedy in *Pacemaker Diagnostic Clinic of America, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537 (9th Cir.) (en banc), *cert. denied*, 496 U.S. 824 (1984):

> We have observed that separation of powers protections, in some cases, have two components. One axis reaches to the person affected by government action and encompasses his or her relation to a constitutional branch; the other axis runs from each governmental branch to the others to ensure separation and independence in the constitutional structure. . . . Where a case is transferred or assigned from an Article III court to a different forum, both the rights of the parties and the relations between the separate branches of the government are implicated.

Id., 725 F.2d at 541 (citation omitted). Both elements identified by Justice Kennedy are implicated in this case. To allow the bankruptcy judge to preside over this jury trial would represent a constitutionally impermissible delegation of judicial power to a non-Article III judge and would deprive petitioners of their constitutional right to a jury trial before an Article III tribunal.

1. A Jury Trial in Bankruptcy Court Would Constitute an Improper Delegation of the Essential Attributes of Judicial Power.

The seminal case in determining the limits of the bankruptcy court's jurisdiction under Article III is *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

This Court there reviewed the attempted Congressional extension of bankruptcy jurisdiction in the 1978 Act and found that it violated Article III:

> As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, §1. *The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III.*

458 U.S. at 58-59 (emphasis added). This Court found that bankruptcy judges lacked the essential attributes of Article III judges: they hold office only for a term of years, can be removed from office other than by impeachment and their compensation may be decreased during their term of office. Thus, this Court held, bankruptcy judges could not be allowed to exercise the judicial power of the United States as had been intended by Congress in the Bankruptcy Act of 1978.

Appellants in *Northern Pipeline* attempted to justify the position of the bankruptcy judges as adjuncts of the district court who did not independently exercise judicial authority but who worked with the district courts and assisted them in exercising their responsibilities. This Court rejected that argument as constitutionally insufficient and established a two-pronged test to determine when judicial responsibility can be assigned to a non-Article III tribunal:

> [First] . . . with respect to congressionally created rights, some factual determinations may be made by a specialized fact finding tribunal designed by Congress, without constitutional bar, ... Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court.

458 U.S. at 80-81.

Included among the "essential attributes" of judicial power by the *Northern Pipeline* court was "the power to preside over jury trials. . . ." 458 U.S. at 85. Subsequently, in *CFTC* v. *Schor*, 478 U.S. 833, 853 (1986), this Court observed that the power to preside over jury trials was one of the "essential attributes of judicial power" of the United States. A jury trial conducted by a bankruptcy judge would deprive the district court of all essential elements of the judicial power and thus fail the second prong of the *Northern Pipeline* test.

In *United States* v. *Raddatz*, 447 U.S. 667 (1980), this Court approved referral of pretrial matters to a United States magistrate pursuant to 28 U.S.C. §636(b) so long as the district court retained control of the litigation. As noted by Chief Justice Burger, 447 U.S. at 683 (emphasis added):

> [A]lthough the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants," . . . that delegation does not violate Art. III *so long as the ultimate decision is made by the district court.*

A jury trial conducted by a bankruptcy judge would place all the power and authority of a trial judge in the hands of an Article I tribunal, and an Article III judge could only review the transcript of proceedings on appeal. This is constitutionally impermissible.[5] As observed in *Northern Pipeline*, 458 U.S. at 86 n. 39:

> Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations

5 *Raddatz*, 447 U.S. at 680-83, upheld the referral of a non-jury matter to a U.S. Magistrate because, by statute, the district court was empowered to review the magistrate's decision *de novo*. Thus the district judge made the "ultimate decision" in the case. *De novo* review is not available in a jury trial because the Seventh Amendment proscribes reexamination of facts determined by a jury.

> of law, as well as the nature of the case as it has been shaped at the trial level.

Nor can the delegation of jurisdiction to preside over jury trials be justified by arguing that a bankruptcy judge sits as a mere adjunct of the district court and would merely be exercising the district court's jurisdiction by presiding over a jury case. This argument was considered and rejected by Chief Judge Lay in his dissent in *Lehman Bros. Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, 739 F.2d 1313, 1318 (8th Cir. 1984) (en banc), *cert. denied*, 104 U.S. 158 (1985):

> To urge, . . . that magistrate appointment, case reference and recall, and appellate review is sufficient Article III supervision ignores, I feel, the historical underpinnings of Article III. The magistrate's role is not limited to that of an adjunct. These non-Article III judges have been given power to adjudicate "laws of national applicability and affairs of national concern." *Palmore* v. *United States*, 411 U.S. 389, 408, 93 S.Ct. 1670, 1681, 36 L.Ed.2d 342 (1973). This, I feel, is an unconstitutional delegation, by Congress, of the judicial power of the United States to judges that are not protected by the dictates of Article III.

For purposes of this brief it is not necessary to engage in an extended discussion of the doctrine of separation of powers and the dangers inherent in allowing Congress or the courts themselves to assign the "essential attributes" of the judicial power to non-Article III tribunals. Those topics are fully discussed in *Northern Pipeline* and in the excellent exposition of Judge Schroeder in his dissent in *Pacemaker Diagnostic*, 725 F.2d at 547-55. It is sufficient here to note that Article III prohibits either Congress or the district courts from delegating the power to preside at jury trials to Article I bankruptcy judges.

2. A Jury Trial in Bankruptcy Court Would Deprive an Individual Litigant of His Right to a Trial Before an Article III Judge.

In *Schor* this Court recognized that Article III confers upon a litigant a "*personal right*" to "an impartial and independent federal adjudication of claims within the judicial power of the United States." 478 U.S. at 848 (emphasis added). *See Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) ("basic constitutional protections designed in part for the benefit of litigants"); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) (Art. III entitled ex-serviceman to the "safeguards afforded those tried in the regular courts"); *Ng Fung Ho* v. *White*, 259 U.S. 276, 285 (1922) (persons invoking a constitutional determination of their claims"). As noted by Justice Kennedy in his discussion of jury trials conducted by magistrates in *Pacemaker Diagnostic*, 725 F.2d at 541:

> . . . [W]e recognize the principle that parties to a case or controversy in a federal forum are entitled to have the cause determined by Article III judges . . .[6]

This right presumes the presence of an Art. III judicial officer: a judge whose ability to be "impartial and independent" is secured by lifetime tenure and an irreducible salary. *Northern Pipeline*, 458 U.S. at 59. A bankruptcy judge is not such an officer, *Northern Pipeline*, 458 U.S. at 460, nor is a magistrate, *Raddatz*, 447 U.S. at 704 (Marshall, J., dissenting). If a bankruptcy judge is allowed to preside over a jury trial, then the litigant will be deprived of this constitutional right.

However, as noted in *Lehman Bros.*, 739 F.2d at 1315, citing *Goldstein* v. *Kelleher*, 728 F.2d 32, 35 (1st Cir. 1984):

> [I]nsofar as Article III protects individual litigants, those protections can be waived. *Cf. Patton* v. *United States*,

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6 Justice Kennedy notes that this right is subject to some exceptions "yet to be fully delineated by the Supreme Court," 725 F.2d at 541, citing *Northern Pipeline*. Those exceptions undoubtedly involve the public rights/congressionally created rights doctrine, territorial courts and the courts of the District of Columbia, and military courts. *See Northern Pipeline*, 458 U.S. at 64-70.

> 281 U.S. 276, 281 [50 S.Ct. 253, 74 L.Ed. 854] (1930) * * * (waiver of sixth amendment guarantee of trial by jury). The plaintiff as well as the defendant here voluntarily consented to have this action handled through to judgment by a magistrate.

Thus, the circuits have recognized that even though an individual litigant has a personal right to have an Article III judge preside at a trial, this "Due Process" right is satisfied when the parties consent to the referral of the case to an Article I magistrate. Conversely, as in this case, when a party has refused to consent, reference has been held unconstitutional. As observed in *In re Wickline*, 796 F.2d 1055, 1058 (8th Cir. 1986) (citations omitted):

> In fact, references under [28 U.S.C. §636(c)] were found permissible and not in violation of the parties' due process rights primarily because of the requirement that all parties and the district court consent to the transfer of the case to the magistrate.

Petitioners here have not consented to have this matter tried before an Article I judge. Indeed, petitioners have consistently denied the bankruptcy judge's jurisdiction to proceed with a jury trial. The bankruptcy judge is but an Article I tribunal, and since petitioners have not consented to his jurisdiction, he cannot consistent with the Constitution preside at the trial of this case.

III.

A Jury Trial in Bankruptcy Court Would Violate the Seventh Amendment to the Constitution.

The Seventh Amendment to the Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Granfinanciera resolved the question of whether parties such as petitioners have a right to have actions such as this heard and determined by a jury. Simply impaneling a jury does not, however, satisfy petitioners' right to a trial by jury as required by the Seventh Amendment. A jury is an essential component of a party's Seventh Amendment right, but the right encompasses more. Equally important to the concept of trial by jury is the question of who should preside at the trial. Because a "jury trial" by definition involves the judicial power of the United States, the trial must be conducted by an Article III judge.

A. An Article III Judge Must Preside Over a Seventh Amendment Jury Trial.

A litigant's Seventh Amendment right to have a district judge preside over a jury trial is similar to his rights under Article III. There is a distinction, however. From a litigant's standpoint, Article III rights relate generally to the quality of the administration of justice. The Seventh Amendment concern is more specific: the effect a presiding officer has on a jury trial.

This concern was discussed in depth by Judge Posner in his dissent in *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1048-49 (7th Cir. 1984):

> Appellate review in the federal system leaves great power in the hands of the district judges; and as noted earlier, magistrates' decisions under section 636(c) are reviewed under the identical standards as district judges' decisions. Appellate control over the conduct of jury trials, as in this case, is especially limited. The tone in which the trial judge addresses the jurors, counsel, and witnesses; his rulings on evidence (especially evidence sought to be excluded as cumulative or prejudicial); his management of the pace of the trial; his decisions on the length and phrasing of the jury instructions; the manner in which he reads or paraphrases the instructions to the jury; his supervision of the jury's deliberations — these discretionary aspects of the trial judge's responsibility are largely beyond the power of an appellate court to correct, yet they can influence a jury's verdict. Federal

> district judges can even comment to the jury on the weight of the evidence (though they rarely do so nowadays). So could magistrates presiding under section 636(c).

See also Gomez, 109 S.Ct. at 2247.

The Seventh Amendment right to a jury trial presumes the personal presence of an Article III district judge.

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an *officer* vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a *trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them* on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.

Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899) (emphasis added).

The fact that a bankruptcy judge may be more or less competent to preside over a jury trial than a district judge is irrelevant.[7] As recognized by Judge Posner, and as is known to any lawyer who has ever tried a jury case, the judge presiding over a jury is a vital, intrinsic element of the trial. In the federal courts jury trials "are under the *constant* superintendence of the trial judge . . . [who is] 'not a mere moderator,' but 'is the governor of the trial' . . ." *Crowell v. Benson*, 285 U.S. 22, 61 (1932) (emphasis added).

Petitioners have a Seventh Amendment right to have this jury case tried by a judicial officer appointed by the President with the advice and consent of the Senate, serving during good behavior

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7 In *Glidden Co.*, 370 U.S. at 533-34, this Court indicated that Article I judges may not bind litigants in Article III courts, no matter how impeccably they conduct the proceedings.

for a compensation which cannot be reduced during the judge's term of service. Congress has the power to imbue bankruptcy judges with these attributes, but it has not chosen to do so.

B. A Jury Trial in Bankruptcy Court Would Require Abandonment of the Existing Scheme of Appellate Review.

The very question of review of a bankruptcy court's determination of the facts raises serious constitutional questions if a bankruptcy court is to determine factual issues by jury verdict. The Seventh Amendment to the United States Constitution provides:

> [N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Bankruptcy judges' orders in non-core proceedings are to be reviewed *de novo*, 28 U.S.C. §157(c)(1); orders and judgments in core proceedings are reviewed under a "clearly erroneous" standard. Bankruptcy Rule 8013. Neither standard equates with the standard for review of a jury verdict "according to the rules of the common law" as required by the Seventh Amendment. Although the *de novo* or clearly erroneous standard of review may not run afoul of the Seventh Amendment when appropriately applied to factual findings in a bench-tried case, *see United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948), it would violate the Seventh Amendment to permit such judicial review of the verdict of a jury under either standard.

According to the rules of the common law, a verdict is to be reviewed only to determine whether or not substantial evidence exists to support it. *See, e.g., Granberry* v. *O'Barr*, 866 F.2d 112, 113 (5th Cir. 1988). Review of the findings of fact, *i.e.*, the verdict of the jury, under a *de novo* standard would be tantamount to denial of a jury trial. *See In re Wickline*, 796 F.2d at 1057. Review under the clearly erroneous standard would likewise

impermissibly allow the substitution by the district court or bankruptcy judge panel of its findings for those of the jury.

Nor is this problem avoided if the district court simply applies the "no substantial evidence" test when the matter finally comes before it. Such an approach would not only require the district court to ignore or declare invalid the scheme of review established by Rule 8013 and 28 U.S.C. §157(c)(1), but also deprive the district court of the power and right to make the ultimate decision in the case and thus would violate Article III. *Raddatz*, 447 U.S. at 683.

Furthermore, 28 U.S.C. §158 provides that review *may* be by a panel of three *bankruptcy* judges instead of by an Article III district judge. To permit any review of a jury verdict by a panel of non-Article III bankruptcy judges would violate the Article III limitations on the delegation of judicial power.

A jury trial of this case before a bankruptcy judge presents insurmountable problems. A litigant's Seventh Amendment right can only be preserved by a jury trial presided over by an Article III judge.

CONCLUSION

In view of the above and foregoing arguments and authorities cited in support thereof, *amicus curiae* respectfully urges that this Court reverse the holding of the Second Circuit below that the jury trial which petitioners have demanded and to which they are entitled may be held in the bankruptcy court.

Respectfully submitted,

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